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Case No: 2008 Folio 1057 and
2009 Folio 192

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2009

Before :

MR. JUSTICE TEARE

- -

Between :

MIDGULF INTERNATIONAL LIMITED	**Claimant**
- and -	
GROUPE CHIMICHE TUNISIEN	**Defendant**

- -
- -

Sara Masters (instructed by **Swinnerton Moore LLP**) for the **Claimant**
Michael Nolan (instructed by **Salans**) for the **Defendant**

Hearing dates: 27 and 28 April 2009

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Judgment

Mr. Justice Teare:

1. The Claimant, Midgulf, is a trader in sulphur. The Defendant, GCT, is a company owned by the state of Tunisia which has a substantial demand for sulphur. It is now common ground that the parties entered into contracts in 2008 for the sale and purchase of sulphur. The first contract, which I shall call the June contract, was for the sale by Midgulf and purchase by GCT of about 23,000 mt of sulphur. The second contract, which I shall call the July contract, was for the sale and purchase of about 150,000 mt of sulphur. It is common ground that the June contract contained a London arbitration clause. There is a dispute between the parties as to whether the July contract did so.

2. GCT have complained about the quality of the sulphur supplied under the June contract and in consequence have also complained about the quality of sulphur supplied under the first shipment pursuant to the July contract. As a result the July contract was terminated and substantial claims and counterclaims under both contracts have been intimated. It is now agreed that the dispute under the June contract must be resolved in London arbitration. Midgulf wishes the dispute under the July contract also to be resolved in London arbitration. GCT wishes it to be resolved in the courts of Tunisia.

3. Midgulf has made an application to appoint an arbitrator pursuant to section 18 of the Arbitration Act 1996 and also applies for an order continuing an anti-suit injunction granted by Burton J. on 19 February 2009 restraining GCT from taking proceedings in Tunisia. Those applications are opposed by GCT which has issued its own applications seeking orders that the court has no jurisdiction to grant the orders sought.

<u>The procedural history</u>

4. On 13 October 2008 Midgulf issued an application before this court for the appointment of an arbitrator under the July contract. On 24 October GCT took two steps. First, it stated that it was willing to nominate an arbitrator so long as the tribunal rendered an award on the validity of the alleged arbitration agreement. Secondly, it issued proceedings in Tunisia seeking a declaration that there was no arbitration agreement between the parties ("the declaration action"). On the same day Midgulf sought clarification of what GCT was doing. On 28 October Midgulf replied that it was obliged to defend its point of view before the arbitral tribunal and at the same time was seeking an order from the Tunisian court as to the "validity" of the alleged arbitration agreement.

5. On 13 November GCT issued two sets of proceedings in Tunisia, the one claiming damages under the June contract, the other claiming damages under the July contract ("the damages actions"). On 29 November Midgulf served submissions in the declaration action. On 13 December GCT served further submissions in the declaration action. On 18 December GCT issued an application in this court challenging the jurisdiction of this court to appoint an arbitrator.

6. On 13 January 2009 Midgulf served submissions in the damages actions and on 17 January Midgulf served further submissions in the declaration action. On 2 February Midgulf gave notice to GCT that an application for an anti-suit injunction was to be

made in this court. On 7 February there was an oral hearing of the declaration action and the judge indicated he would give judgment on 28 February. On 13 February Midgulf issued its application for an anti-suit injunction and on 19 February that injunction was granted by Burton J. "*ex parte* on notice". On 2 March GCT issued an application challenging the jurisdiction of this court to grant an anti-suit injunction.

7. On 28 March the Tunisian court gave judgment. A translation of the judgment has been placed before this court. It appears that the court decided not to determine the question whether there was an agreement to London arbitration in the July contract. The reasons for that decision do not readily appear from the translation but evidence has been provided to this court as to what those reasons were. Maitre Ferchiou, a Tunisian lawyer acting for Midgulf, has said that the court held that the arbitral tribunal must decide the question on the principle of *Kompetenz/Kompetenz*. But Professor Ben Fadhel, a Tunisian lawyer acting for GCT, has said that the court did not decide the question because the effect of article 52 of the Tunisian Constitution was that the court could only decide that question in cases where there was a "fundamental" claim, i.e. in a case where damages are claimed, and therefore not in the declaratory action.

The June contract

8. Although this court is not asked to make any orders regarding the June contract and the question when it was made and on what terms are matters to be determined in arbitration it is necessary to refer to it because references are made to it in the correspondence relied upon by Midgulf with regard to the July contract. Nothing which I say about the June contract is intended to bind the arbitrators dealing with the dispute under the June contract.

9. By a 3 page fax dated 25 June 2008 Midgul offered to sell about 23,000 mt of sulphur to GCT. One of the terms provided:

> "ARBITRATION English law to govern. Venue in London."

10. The offer ended by saying:

> "All other terms and conditions as per Midgulf Saudia Arabia standard sales contract."

11. On 26 June CGT replied by fax to that offer. The fax stated:

> "We are pleased to confirm out agreement to purchase the offred (sic) cargo provided the following amendments to your offer."

12. There then followed 7 amendments. The fax concluded by saying:

> "Other terms and conditions as per you're a/m offer except for its two last lines which must be cancelled."

13. The last two lines there referred to were the lines in the fax dated 25 June incorporating Midgulf's standard sales contract.

14. The fax dated 26 June therefore appears to be a counter offer.

15. On 27 June Midgulf sent two faxes. It is not known which was sent first. One fax thanked GCT for its "confirmation" and attached a "contract signed and stamped by us" requesting GCT to counter sign and stamp it. The attached contract ran to 7 pages and included terms which had not been agreed. The other fax thanked GCT for its "purchase confirmation which we have accepted."

16. It was submitted on behalf of GCT that by the latter fax dated 27 June Midgulf accepted GCT's counter offer dated 26 June. No alternative analysis of the correspondence was argued before me and (for the purposes of the applications before me) I accept that submission. The former fax was never returned signed or stamped by GCT.

The July contract

17. The application for an anti-suit injunction states that the July contract is "contained in and/or evidenced by an email from Midgulf to GCT dated 2 July and an email from CGT to Midgulf dated 7 July". However, it was apparent from the evidence and skeleton argument that reliance was also placed on the terms of a telephone conversation on 4 July. The terms of that conversation are disputed and it was common ground that I could not resolve the dispute between the parties as to what was said in that conversation. The argument before me therefore proceeded on the basis of the written correspondence alone. However, any final determination of the terms of the July contract (by whatever court or tribunal) must resolve that dispute and address the terms of the July contract in the light of its findings as to that telephone conversation.

18. By a fax dated 2 July Midgulf were "pleased to indicate subject our reconfirmation" the sale of about 150,000 mt of sulphur on certain terms, including terms as specifications, price (US$897 pmt CFR (free out)), packing, origin and shipment (July, August, September 2008 schedule to be agreed in due course). Other terms, including those as to arbitration, "will be as per our contract no's/s/sulphur/2008/06/27 dated June 27 2008" which was a reference to the form of contract forwarded to GCT for signature and stamping but which was not signed or stamped by GCT. This fax was referred to in the argument before me as an offer though there was not, I think, any evidence that it was ever "reconfirmed" as such. Acceptance was required by 3 July.

19. By fax dated 2 July GCT asked that the validity of the offer be extended until 7 July. There then followed a telephone conversation between Mr. Hamrouni of GCT and Dr. Huraira Dajani of Midgulf. By a further fax dated 2 July Midgulf reduced the price by US$2 per mt and extended the offer until 7 July.

20. There was a further telephone conversation on 4 July as to which there was conflicting evidence and as to which no submissions were made before me because I could not resolve the dispute without oral evidence. I must however record the rival cases. Dr. M.Z. Dajani of Midgulf states that Mr. Hamrouni "enthusiastically confirmed GCT's agreement to our terms for the purchase of 150,000 metric tons at a price of US$895 per metric ton CFR" and "said that on this occasion his boss would sign the confirmation fax" which was merely "a formality". Mr. Hamrouni recalls

speaking to Dr. Dajani but states that he said that "we were interested in buying the sulphur" but that he "would have to report to different departments in GCT for the final decision." He denies saying that GCT agreed all of the terms proposed by Midgulf.

21. By an email dated 8 July Midgulf complained to GCT as follows:

> "Contrary to our oral agreement of sale on last Friday [4 July] today it is Tuesday 8/07/2008 and we still haven't received GCT written confirmation for the 150,000 mt sulphur contract."

22. By a fax dated 7 July but which was sent on 8 July (and, I am told, crossed with Midgulf's e-mail of 8 July) GCT "confirmed the purchase of 150,000 mt of sulphur at the following conditions". The conditions which were then set out related to the draft at the discharge ports, the specifications (which were said to be "as per your offer by fax dated July 2nd. 2008"), origin, packing, shipment and price. The subject matter of these conditions was therefore the same as that of the terms set out in the offer of 2 July save for the reference to the draft at the discharge ports. The fax requested Midgulf to submit a loading schedule as well as the name of the performing vessels in July. It ended by saying:

> "We congratulate ourselves for this conclusion and look forward to its smooth execution."

23. By a fax dated 9 July Midgulf thanked GCT "for your confirmation of acceptance of our offer dated 02/07/2008 per your fax …dated 07/07/2008. Accordingly we are in contract…."

24. On 10 July Midgulf sent to GCT a pro forma invoice for the first shipment of 35,000 mt of sulphur on MV AGIOS NEKTARIOS and requested that the letter of credit be opened within 48 hours. The pro forma invoice provided that the letter of credit was to be payable at sight. Later on 10 July GCT requested that the letter of credit be payable 30 days from the bill of lading date or 21 days after wire transfer "as we never agreed to payment by l/c at sight." GCT requested that Midgulf choose one of the two alternatives put forward by GCT. Later that day a revised pro forma invoice was provided by Midgulf which required that the letter of credit be paid 30 days from the bill of lading date.

25. On 14 July GCT sent to Midgulf (though apparently not seen by the relevant individuals) a fax which proposed that the contract be construed and governed by Tunisian law and that disputes be resolved in Tunisia or by ICC arbitration. The terms of this fax appear to relate to the June contract but internal correspondence on GCT's side indicated that it was intended to relate to the July contract.

26. On 18 July GCT opened a letter of credit in respect of the first shipment under the July contract.

27. On 22 July, after problems had arisen with the quality of the sulphur shipped under the June contract, the July contract was treated by GCT as "resiliated" by which GCT meant terminated.

The respective cases

28. It is Midgulf's case, as set out in the application, and advanced at the hearing before me, that the fax dated 7 July was an acceptance of Midgulf's offer of 2 July. This was consistent with Midgulf's fax dated 9 July. The terms of the faxes dated 2 and 7 July when objectively construed make it clear that "in accepting Midgulf's proposal, GCT intended that the second contract would be subject to all of the terms proposed in Midgulf's offer (including the arbitration provision specifically referred to in that offer) save for those conditions specifically put forward by GCT insofar as they differed from the terms of Midgulf's offer." It was stressed that GCT did not say that they were accepting on the "following conditions only".

29. GCT say that there are difficulties with this analysis. The offer dated 2 July introduced a "condition" regarding the draft at the discharge ports. The introduction of that condition indicated that the fax of 7 July was in fact a counter offer. Also, no mention was made of GCT accepting that all other terms, including that as to arbitration, would be as per "the contract dated 27 June" which had been forwarded to GCT for signature and stamping but which had not been signed or stamped by GCT.

30. GCT accept that there was a July contract, albeit one that did not contain a London arbitration clause. I asked counsel how GCT says that such contract was formed. I was given two answers. The first was on the basis of English law. It was said that the fax dated 9 July from Midgulf was an acceptance of the terms counter-offered by GCT in their fax of 7 July. There was therefore a contract on the "main" terms. Other more detailed terms (including those as to law and jurisdiction) had not been agreed but that did not prevent there being a contract on the agreed main terms. The second answer was on the basis of Tunisian law. It was said that there was a concluded agreement when the terms of the letter of credit for the first shipment had been agreed. That appears to have been on 10 July.

31. The objective construction of GCT's reply dated 7 July is not easy to assess. On the one hand there are passages which are redolent of the language of acceptance ("we are pleased to confirm the purchase..…we congratulate ourselves for this conclusion"). On the other hand the introduction of the condition relating to drafts at the discharge ports suggests that the reply was in fact a counter offer because such term was not mentioned expressly in the offer of 2 July. Moreover, had GCT's intention been to accept the offer of 2 July there would have been no need to set out "the following conditions". Setting out such conditions suggests that it was intended that those were the terms GCT intended to accept. Those conditions did not include an incorporation of the contract dated 27 June which had been sent for signature and stamping. It is difficult to say that GCT was intending (objectively) to be bound by such incorporation when it sets out the conditions on which it states that it will purchase and those conditions make no reference to such incorporation.

32. In response to these suggested difficulties counsel for Midgulf relied upon a number of matters.

33. First, with regard to the condition relating to drafts it was suggested that this was merely a statement of fact. However, the provision concerning drafts was one of the "following conditions". The others were matters of obligation. The natural

construction of the fax is that the provision concerning drafts was also a matter of obligation. It was further said that it was not a new condition because the "contract dated 27 June" which was to be signed and stamped and which Midgulf required to be incorporated into the July contract also contained at clause 8 the following provision: "Buyer to guarantee the draft at Port Gabes or Sfax, Tunisia, is 31.00 feet saltwater." GCT was therefore merely doing what had been requested and was not adding a new contractual term. However, if, as is Midgulf's case, the terms of the 27 June contract were accepted as being incorporated then there was no need to include the drafts condition because the terms of "the contract dated 27 June" included such guarantee.

34. Secondly, it was said that said that the probabilities assist Midgulf. GCT had agreed a London arbitration clause with reference to the June contract. It is said to be inherently improbable that when making a further contract shortly afterwards GCT would do so on terms that made no reference to dispute resolution. There is some force in this but it is limited because the mechanism by which the July contract is said to contain a London arbitration clause is by incorporation of "the contract 27 June" which contained other terms which were not accepted by GCT as part of the June contract.

35. Thirdly, reliance was placed upon statements made after it was said that the July contract had been formed.

    i) In its fax dated 22 July GCT complained that the quality of the sulphur was not in conformity with the specifications stated by their offer dated 02/07/08 "on the basis of which our agreement has been mutually concluded". A similar statement was made in a fax dated 24 July. However, assuming that a fax sent after the conclusion of the contract is admissible in determining the objective construction of that correspondence which had earlier given rise to the contract (which was in dispute) I do not consider that these faxes assist. The specifications set out in the fax dated 2 July were specifically accepted in GCT's fax dated 7 July.

    ii) Reliance was also placed on a survey report of the cargo shipped pursuant to the June contract which recorded that representatives of GCT (not, it seems, those engaged in the negotiations for the July contract) referred to the contract dated 27 June which had been sent for signature and stamping as "the contract". However, the correspondence at the material time (June) does not reveal that the contract dated 27 June was accepted by GCT and in any event this survey report did not concern the July contract.

<u>The required strength of Midgulf's case</u>

36. This is a case where an anti-suit injunction is sought at the interlocutory stage of proceedings. However, if the injunction is granted its effect is likely to be final because it will end the Tunisian proceedings and enable the arbitration proceedings to be completed. In such circumstances this court has required the applicant for an anti-suit injunction to establish "a high degree of probability" that its case against the respondent is right and that it is indeed entitled as of right to restrain the respondent from taking proceedings abroad; see *Bankers Trust v Jakarta Int.* [1999] 1 Lloyd's Rep. 910 at p.913, and *American International Speciality Lines Insurance v Abbott Laboratories* [2003] 1 Lloyd's Rep. 267 at p.275. It was not suggested that I should

apply any higher test (cf *Sheffied United v West Han United* [2009] 1 Lloyd's Rep. 167 at paragraphs 8-10). In oral submissions it may have been suggested that a lesser test should be applied but it was not clear to me what that was. I consider that I should follow the approach adopted in *Bankers Trust v Jakarta Int.* and *American International Speciality Lines Insurance v Abbott Laboratories*.

Discussion

37. Midgulf's case that the fax dated 7 July was an acceptance of the offer contained in the fax dated 2 July is certainly arguable. The language of "confirmation" and "conclusion" is a clear indication that the deal had been done. For that to be so GCT must have accepted all of the terms in Midgulf's offer, including the incorporation of "the contract dated 27 June" amongst which was the London arbitration clause. On this construction the reference to "the following conditions" in the fax dated 7 July was simply a summary of the principal terms agreed. Of course, if the written exchanges are construed in the context of Midgulf's case as to the telephone conversation of 4 July Midgulf's case gains strength.

38. But GCT's case that its fax dated 7 July, notwithstanding the use of the language of "confirmation" and "conclusion", was a counter offer, accepted by Midgulf's fax dated 9 July, is also arguable. The fax is, on objective analysis, to be regarded as a counter offer because it introduced a condition regarding drafts and the list of conditions on the basis of which GCT stated that it was willing to contract did not include an incorporation of the "contract dated 27 June." The contract formed by the acceptance of that counter offer on 9 July was one which contained only the main terms of the agreement, with the detailed terms, including law and jurisdiction, to be agreed later; see *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601 at p.619 (principles (4)-(6)). It is possible that this argument derives some support from GCT's account of the telephone conversation of the 4 July.

39. Had the terms of the July contract depended solely on the construction of the written exchanges between the parties this court would have been able to determine whether Midgulf had established to a high degree of probability that its case was correct. Indeed the court could have determined whether the July contract contained a London arbitration clause. But the content of the conversation of 4 July has, or may have, an important bearing upon the correct objective construction of the written exchanges in their context (because that context must include that conversation which took place between the faxes dated 2 and 7 July). The court is not therefore able to reach the conclusion that Midgulf has established "a high degree of probability" that its case against GCT, that the July contract included a London arbitration clause, is right and that it is therefore entitled as of right to restrain GCT from taking proceedings in Tunisia. I accept that Midgulf has a strongly arguable case to that effect but that is not sufficient in the present context for the reasons stated in *Bankers Trust v Jakarta Int.* and *American International Speciality Lines Insurance v Abbott Laboratories*.

40. That would suggest that the anti-suit injunction granted *ex parte* on notice by Burton J. must be refused.

41. I confess to a sense of unease in reaching that conclusion because the Tunisian court has refused to decide whether the parties had agreed a London arbitration clause. I suggested to counsel that if this court refused to grant an anti-suit injunction and the

decision of the Tunisian court were upheld on appeal there would be a stalemate. Neither court would determine whether the July contract contained a London arbitration clause. However, counsel for GCT said that the Tunisian court will determine whether the July contract contained a London arbitration clause if, as it is said will be the case, that question is raised in the damages action in Tunisia regarding the July contract. Counsel further said that if GCT loses on that issue it will arbitrate in London. It was therefore said that there is no risk of a stalemate.

42. However, it is not clear to me that the Tunisian court will decide the question if it is raised in the damages action. It may nevertheless say that it is a matter for the arbitral tribunal on the principle of *kompetenz kompetenz*. The doubt arises from the uncertainty as to the reasons for the Tunisian court's decision and as to what the Tunisian court of appeal will do. There is therefore a risk of stalemate.

43. In those circumstances I consider that the just and appropriate course is, on case management grounds, to order a speedy trial of the issue as to the terms on which the July contract was agreed (at which trial oral evidence can be given as to the conversation of 4 July) and to continue the anti-suit injunction only until such time as that issue is determined. Once that issue is decided the court can then decide whether or not to appoint an arbitrator and continue the anti-suit injunction indefinitely. This course reflects the third of the four possible courses identified in *Al-Nami v Islamic Press* [2000] 1 Lloyd's Rep. 522 at p.524 where a stay of proceedings is sought.

44. It was submitted by counsel for GCT that there were other reasons why an anti-suit injunction should be refused. I shall consider each in turn.

Submission to the jurisdiction

45. GCT have commenced three actions in Tunisia; the declaration action and two damages actions. The damages action which relates to the June contract has been abandoned. GCT submits that whilst Midgulf has not submitted to the jurisdiction of the Tunisian court in respect of the damages action which relates to the July contract it has submitted to the jurisdiction of the Tunisian court with regard to the declaration action. For that reason it is said that the anti-suit injunction ought not to be continued with respect to the declaration action. Midgulf denied that it has submitted to the jurisdiction with regard to the declaration action.

46. The basis of GCT's submission is that the declaration action concerns the question whether the parties have agreed to London arbitration with regard to the July contract and Midgulf have engaged with GCT on that issue before the Tunisian court, exchanging written submissions and appearing at an oral hearing. In determining whether Midgulf have submitted to the jurisdiction of the Tunisian court assistance is provided by *Akai v People's Insurance* [1998] 1 Lloyd's Rep. 90 at pp.96-98. The following principles may be drawn from case:

    i) In determining whether the steps taken by a party in a foreign court amount to a submission the question is whether such steps were only necessary or useful if the party was not objecting to the jurisdiction.

ii) The matter must be considered objectively having regard to the general framework of the court's procedural rules but also to the domestic law of the court where the steps were taken.

iii) Where the steps taken would be regarded in this court as a submission but would not be regarded as such by the foreign court the view of the foreign court may well be decisive because it would be illogical for this court to find that a person had submitted to the jurisdiction of the foreign court in circumstances in which that court would find that he had not submitted.

iv) But the converse is not necessarily true. An English is court is not bound by the characterisation of a step as a submission merely because the law of the foreign court would so regard it.

v) A broad test is to be applied as to the purpose of the steps taken in the foreign court.

47. Midgulf was faced with a claim before the Tunisian court seeking a declaration that the parties had not agreed to a London arbitration clause. It responded to that claim on 29 November, after the damages actions had been commenced, by arguing that the parties had agreed a London arbitration clause. Had the Tunisian court determined that dispute in favour of Midgulf it is likely that the court would have stayed the damages action in favour of London arbitration. Thus, viewing the matter broadly, it can fairly be said that Midgulf did not take a step which was only necessary or useful if Midgulf was not objecting to the jurisdiction of the Tunisian court to determine the damages action. It is only if one takes a narrow view of the steps taken by GCT in the declaration action and divorces that action from the damages action that it can be argued that GCT submitted to the jurisdiction of the Tunisian court to determine the question raised in the declaration action, namely, whether the parties had agreed a London arbitration clause. But the court should not take a narrow view when determining the question whether a party has submitted to the jurisdiction of a foreign court. Moreover, there is no sense in divorcing the declaration action from the damages action. The former only has relevance because of the latter. Also, by refusing to determine the dispute the Tunisian court does not appear to have treated Midgulf as having submitted that dispute to its jurisdiction. I am unable therefore to accept the submission that Midgulf has submitted to the jurisdiction of the Tunisian court.

48. It was further submitted, on behalf of Midgulf, that GCT had represented that it would not assert that Midgulf had submitted to the jurisdiction of the Tunisian court if it responded to the claim in the declaration action and that, in reliance upon that representation, Midgulf responded to the declaration action. I shall deal with this submission briefly because it does not strictly arise for decision in the light of my finding that there was no submission.

49. The plea of estoppel was based upon GCT's fax dated 28 October in which GCT stated:

> "It will be quite natural that Midgulf appoints its lawyers to defend its position before the Tunisian Court. Such an attitude will not be considered by us as contradictory with its own claim."

50. In order for a representation to found an estoppel it must be clear and unequivocal. GCT represented that if Midgulf responded to the declaration action in Tunisia GCT would not regard such response as "inconsistent" with Midgulf's own claim for an arbitrator to be appointed by this court. The question whether such response would be regarded as a submission to the jurisdiction of the Tunisian court was not mentioned in terms. Nor had an application been made for an anti-suit injunction at the time of GCT's fax. In such circumstances I do not consider that the representation in the fax can be regarded a clear and unequivocal representation that GCT would not say, in response to an application for an anti-suit injunction, that Midgulf had submitted to the jurisdiction of the Tunisian court.

Delay

51. GCT commenced its declaration action on 24 October 2008 and its damages actions on 13 November 2008. Although Midgulf contested the declaration action it did not give notice of an intention to seek an anti-suit injunction until 2 February 2009. An application seeking such an injunction was issued on 13 February 2009.

52. It is well established that an application for an anti-suit injunction must be issued "promptly and before the foreign proceedings are too far advanced"; see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87 at p.96 and *The Skier Star* [2008] 1 Lloyd's Rep. 652. In the present case an application for an anti-suit injunction could have been issued in November 2008 in response to the declaration and damages actions. But it was not issued until February 2009 and during that time expense was incurred by both parties in the declaration action.

53. However, although hindsight was not required to understand the importance of seeking an anti-suit injunction in November 2009, the delay in seeking such an injunction was modest. Moreover, Midgulf's participation in the declaration action occurred in the context of GCT's fax dated 28 October which, if it did not actually encourage such participation, at any rate showed that Midgulf's participation was not unexpected notwithstanding Midgulf's desire, manifested by its application for the appointment of an arbitrator on 13 October 2008, to have disputes arising under the July contract referred to arbitration in London. In these circumstances I do not consider that Midgulf's delay in seeking an anti-suit injunction was such as make the grant of an anti-suit injunction inappropriate.

No breach

54. Whilst it is accepted that the damages action in Tunisia would be a breach of the July contract (assuming that the July contract included a London arbitration clause) it is submitted by GCT that the declaration action would not be a breach of such a clause.

55. Midgulf submits that the declaration action would be a breach of the London arbitration clause for three reasons. First, reliance was placed on section 30 of the Arbitration Act 1996 which provides that an arbitral tribunal may rule on its own jurisdiction. Secondly, it was said, in accordance with the decision of the House of Lords in *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep. 254, that parties to an arbitration clause are presumed to intend that any dispute between them arising out of the relationship they have entered into or purported to have entered into should be decided by the same tribunal. Thirdly, it was said that by agreeing to a London

arbitration clause the parties had also agreed that the English court would have exclusive supervisory jurisdiction over the tribunal - see *C v D* [2007] 2 Lloyd's Rep.367 - and that determining whether the parties agreed to a London arbitration clause was part of that jurisdiction.

56. Each of these submissions was disputed although neither counsel argued their respective positions in any detail. I shall deal with each submission shortly.

57. I accept that by agreeing to London arbitration a person is taken to have agreed that the arbitral tribunal has such powers as are conferred upon it by English law, one of which is the power recognised by section 30 of the Arbitration Act 1996 to rule on its own jurisdiction. However, that is not an exclusive power or a power to make a binding determination. Whenever a court is asked, pursuant to the New York Convention Article II, to refer a dispute before it to arbitration on the grounds that there is a London arbitration clause it may decide the question whether a London arbitration clause has been agreed. The parties have not referred that question to the exclusive jurisdiction of the arbitral tribunal; see *Al-Naimi v Islamic Press* [2000] 1 Lloyd's Rep. 522 at p.524 second column to p.525 first column. I am therefore unable to accept the submission that the declaration action was, by virtue of section 30 of the Arbitration Act 1996, a breach of an agreement to refer the question whether a London arbitration clause was included in the July contract to the arbitral tribunal in London.

58. I am also unable to accept the submission that the effect of the decision of the House of Lords in *Fiona Trust v Privalov* is that the parties have conferred exclusive jurisdiction on the arbitral tribunal to determine whether or not the July contract contained a London arbitration clause. The question whether the July contract contained a London arbitration clause is a question which relates directly to the arbitration agreement and therefore is not one which can only be determined in arbitration; see paragraphs 16-20 of Lord Hoffman's opinion and paragraphs 32-35 of Lord Hope's opinion.

59. I must also reject the argument based upon *C v D*. I accept that by agreeing to a London arbitration clause the parties have agreed that the English court has supervisory jurisdiction over that agreement; see paragraphs 30-37 of the judgment of Cooke J. in that case. However, I am not persuaded that the court's "supervisory jurisdiction" for this purpose includes the right to determine whether court proceedings had been brought in breach of an arbitration agreement. Pursuant to Article II of the New York Convention that question will be determined by a contracting state when it is asked to recognise an arbitration agreement and refer a dispute before it to arbitration. By contrast, in *C v D* the court was concerned with appeals from or challenges to awards. In *Weissfisch v Julius* [2006] 1 Lloyd's Rep. 716 (a case referred to in *C v D*) the court was concerned with an application to restrain an arbitrator from acting on the grounds of bias. *A v B* [2007] 1 Lloyd's Rep. 237 (another case referred to in *C v D*) also concerned an application to restrain an arbitrator from acting.

60. It can therefore be argued that there is no basis for an anti-suit injunction in respect of the declaration action in Tunisia. However, this matter should be viewed broadly. The declaration action only has relevance in the context of the damages action. Had the jurisdiction question been raised in the damages action (as it is now suggested it

would be were GCT free to do so) this question of breach would not arise because the damages action would plainly be a breach of the London arbitration clause. In these circumstances I do not consider that the court should divorce the declaration action from the damages action merely because GCT has commenced two actions rather than one action in Tunisia. The court should not consider itself powerless to act in respect of the declaration action when the jurisdiction question, which only has relevance in the context of the damages action, has been raised in a separate action.

Costs

61. It was said that the continuation of the injunction will prevent GCT from appealing the award of costs made against them in the Tunisian court. However, if GCT succeed on the issue as to whether there was a London arbitration clause in the July contract when that issue is tried in this court, the anti-suit injunction will not be continued and GCT will be free to appeal the order as to costs in Tunisia. If GCT loses on that issue GCT can hardly complain of the costs order made against them. I do not regard these matters as a reason for not continuing the anti-suit injunction on the limited basis I have ordered.

The Front Comor and comity

62. It was said that in the light of the decision of the European Court of Justice in the *Front Comor* [2009] 1 Lloyd's Rep. 413 the days of the anti-suit injunction are numbered and that this court should exercise caution before granting an anti-suit injunction. Caution should always be exercised in granting an anti-suit injunction. In any event this case, unlike the *Front Comor,* is not subject to the European Judgments Regulation. Moreover, I am at present only continuing the anti-suit injunction for a limited period. So far as comity is concerned the Tunisian court has declined to decide the question whether the July contract contained a London arbitration clause. This is not a case where two jurisdictions are competing to determine that issue. It is obviously sensible that that issue be determined as soon as possible and by this court in circumstances where the Tunisian court has declined to do so.

Conclusion

63. There should be a speedy determination of the issue whether the July contract contained a London arbitration clause. In the meantime the anti-suit injunction is continued. Once that issue has been determined the court will be able to decide whether to appoint an arbitrator and continue the anti-suit injunction indefinitely. I will discuss the appropriate directions with counsel after handing down this judgment.