Neutral Citation Number: [2010] EWHC 2826 (Comm)

Case No: 2010 FOLIO 900

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

IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2010

Before :

MR JUSTICE BLAIR

- -

Between :

GUANGZHOU DOCKYARDS CO., LTD (formerly known as GUANGZHOU CSSC-OCEANLINE-GSW MARINE ENGINEERING CO. LTD.)	**Claimant**
- and -	
E.N.E. AEGIALI I	**Defendant**

- -
- -

Mr Robert Bright QC and Mr Charles Holroyd (instructed by **Reed Smith**) for the **Claimant**
Mr Bernard Eder QC and Mr Sean O'Sullivan (instructed **by Ince & Co**) for the **Defendant**

Hearing dates: 18 October 2010

- -

Judgment

Mr Justice Blair:

1. This is an application by the defendant ship owners to strike out that part of an appeal against an arbitration award by the claimant dockyard which is an appeal on questions of fact. In summary, the issue between the parties is as follows. The claimant argues that it is open to the parties to an arbitration agreement to agree that questions of fact (as well as questions of law) arising out of an arbitration award can be the subject of an appeal to the English court, and that they have so agreed in this case. In particular, this is said to follow from the principle of party autonomy enshrined in the Arbitration Act 1996. The defendant on the other hand contends that an appeal to the court on factual matters is misconceived, in that: (1) The court has no jurisdiction to hear an appeal against factual findings by arbitrators; and (2) The parties cannot by agreement confer such jurisdiction. Furthermore, the defendant submits, on the true construction of the agreement, the parties did not seek to do so in this case. Both parties agree that these points fall to be decided without reference to evidence, and that the defendant's objection can be dealt with summarily on this application.

2. For the purposes of the application, the factual background can be stated shortly. The ship owners (the "Owners") are a Greek company, and the dockyard (the "Dockyard") is a Chinese company. The dispute concerns a contract dated 7 November 2007 for the conversion of the Owners' VLCC (Very Large Crude Carrier) into a VLOC (Very Large Ore Carrier) by the Dockyard in its Wenchong Yard in the port of Guangzhou, China. The contract was governed by English law, and the parties agreed to LMAA arbitration in London, in terms which I set out below. The work could not be performed, and the dispute was as to the cause. The Owners said that the berth that the yard intended to use was unsuitable to receive the vessel. The Dockyard said that the reason the vessel could not proceed was that an agency called the Guangzhou Maritime Safety Administration was unwilling to allow it to navigate through the waterways of the port. By an award issued on 9 June 2010 as amended on 9 July 2010, the arbitrators (Michael Baker-Harber, Robert Gaisford and Simon Gault) concluded that the Owners succeeded on their claim. They were awarded damages of US$59,614,214, plus interest, and a refund of their first instalment payment of US$9,250,000, plus interest.

3. Following the award, the Dockyard has issued two separate claims in the Commercial Court. The first is an appeal on issues of law pursuant to s.69 of the Arbitration Act 1996. It is common ground that the parties agreed to a right of appeal in that regard in their agreement, and that claim remains to be determined. The second, and the claim that gives rise to this strike out application, is divided into two distinct parts set out in parts B and C of the Claim Form. Part B is the Dockyard's appeal on issues of fact. Part C is the Yard's challenge under s. 68(2)(a) Arbitration Act 1996 (in respect of which leave is not required). The Dockyard argues, and I should make it clear that this is contentious, that Parts B and C both arise out of the same fundamental question, which it says the arbitrators both dealt with unfairly and got wrong. The question, it says, is as to the true meaning of Article 43 of the Rules of Pearl River Estuary Ship Navigation Safety Management (trial) 2002 which has to do with restrictions on navigation in the waters in question. This issue is a question of Chinese law, and thus (as a matter of English law) it is a question of fact, albeit one of a special kind. There are further factual issues which (the Dockyard says) all follow from this, on which the arbitrators' conclusions depended directly on their view as to the meaning of Article 43 which the Dockyard says was wrong. The remaining factual issue (to do with the number of days per annum the vessel could expect to be earning) was, it is said, indirectly affected by it. The s.68 claim is in conventional form and remains to be determined.

4. Before dealing with the arguments, I set out the parties' agreement as to applicable law and arbitration. This is to be found in Article 22 of the ship conversion contract of 7 November 2007 which provided as follows.

> "ARTICLE 22 - APPLICABLE LAW AND ARBITRATION
>
> 22.1 The Contract shall be governed by and construed in accordance with English law;
>
> 22.2 Any dispute concerning the Vessel's compliance or non-compliance with the rules, regulations and requirements of Class shall be referred to the head

> office of Class, the decision of which shall be final and binding upon the Parties hereto.
>
> 22.3 All other disputes or differences arising out of or in connection with this Contract or otherwise shall be referred to arbitration in London, England before a tribunal of three (3) arbitrators. One (1) arbitrator shall be appointed by each Party to this Contract and the third by the two (2) so chosen. All arbitrators shall be full members of the London Maritime Arbitrators Association ("LMAA") and all arbitrations shall be conducted in accordance with the then current Rules of the LMAA and the Arbitration Act 1996. The Parties agree that either Party may appeal to the English High Court on any issue arising out of any award. The Parties agree that any final unappealable judgment of the English High Court (or higher court on appeal therefrom) shall be referred back to the arbitrators and the arbitrators shall issue a final unappealable award in the form of the said judgment."

Jurisdiction: the Dockyard's submissions

5. The Dockyard's arguments are set out in interesting and wide ranging submissions. It accepts that the factual element of its appeal is not a conventional arbitration appeal. It is not an appeal on questions of law under s. 69, nor is it a procedural challenge under s. 68. It is a novel appeal, not least, it says, because it arises under a novel arbitration clause which has not been considered previously by any English Court. In seeking to maintain it, it puts its case on the basis of party autonomy, a principle enshrined in s.1 (b) Arbitration Act 1996. It argues that the single most important feature of arbitration is that it gives the parties the opportunity to choose the particular manner in which their disputes are to be resolved. Accordingly they are able to determine for themselves which potential attributes of the arbitral process are important to them, and how to maximise the aspects that they perceive as advantageous, while minimising the perceived disadvantages. Parties who choose to arbitrate can, it is said, dine à la carte. If they do not like any of the characteristics conventionally associated with arbitration, such as finality, they can agree to opt out, by using a suitably worded arbitration clause. In this respect, the Act reflects the familiar precepts of English law in relation to freedom of contract. Everything is permitted, the Dockyard submits, unless it has been prohibited by statute.

6. The Dockyard points out that by s. 4 of the Act, the mandatory provisions of the 1996 Act are limited to those listed in Schedule 1, which "have effect notwithstanding any agreement to the contrary". All other provisions (the non-mandatory provisions) allow the parties to make their own arrangements by agreement, whether by agreeing to the application of institutional rules or by "providing any other means by which a matter may be decided". Significantly, the list of mandatory provisions does not include s. 69, which deals with appeals. This sets out what Mr Robert Bright QC, counsel for the Dockyard, describes as the default position. He accepts that it is concerned only with appeals on questions of law. However, the opening words of s. 69 reiterate once again, it is submitted, the Act's general deference to the principle of party autonomy, to which the entire section is made subject. The words "unless otherwise agreed by the parties..." show that the section expressly contemplates that the parties may agree something different. The parties are allowed to agree what they

like. This legislative emphasis on the importance of party autonomy was a new feature of the 1996 Act; there had been no provision similar to s. 1 (b) or to s. 4 (2), (3) in any of the equivalent legislation that preceded the 1996 Act.

7. The Dockyard disputes that there is a general principle that parties cannot by agreement confer jurisdiction on a court which the court does not otherwise possess. Cases cited by the Owners such as *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1970] 1 QB 673, [1971] AC 850 are (it is submitted) examples of relief being sought from the court in circumstances where a legal right has been specifically created by a statute and both the existence of the right, its justiciability and the power of the court to grant relief all have been defined by reference to prescribed facts and circumstances. In principle, the claim cannot be brought, and the court does not have the power to determine it, if the circumstances are otherwise (see *Barton v. Fincham* [1921] 2 KB 291 at 296, Bankes LJ). Translating these cases into the terms of the Arbitration Act 1996 can most accurately be done by reference to a mandatory part of the Act such as s. 68. If the parties were to sign a written contract by which they agreed that the arbitrators had misconducted themselves, and it were to come to the attention of the court that that was not the case, the court would disregard their agreement. It would be an attempt to evade a mandatory provision and therefore illegal. The present case, it is submitted, is different. It is not an agreement which seeks to pretend that the facts fall within a statutory requirement that is not actually fulfilled to achieve a goal that the statute intended to prohibit. Rather, it is an agreement which takes advantage of the fact that the statute expressly allows parties to make different arrangements. In so far as they choose to do so, they are acting consistently with the Act and pursuant to it.

8. In oral argument, Mr Bright QC expanded these points as follows. He says that when a court deals with a case of breach of contract, it does so under its inherent jurisdiction. In the present case, Article 22 of the contract equally concerns the contract, and does not seek to confer jurisdiction on the court which it would not otherwise have. Article 22, he says, is in unusual form since it provides that the finality of the award is subject to an appeal to the English High Court. Any final unappealable judgment is referred back to the arbitrators, and only at that stage do the arbitrators issue a final unappealable award in the form of the judgment. The purpose, he says, is to ensure that, following any appeal, there is an award capable of enforcement under the New York Convention. The position is analogous to a GAFTA appeal, with the appeal to the court similarly taking place within the arbitral process.

9. The Dockyard's primary position is that the appeal in Part B of the claim form is a section 69 appeal. The use of the words 'unless otherwise agreed' in s.69 is sufficient to allow an appeal on fact if that is what the parties have agreed. Alternatively, its validity falls to be considered (it is submitted) like any other appeal, the question being whether it is prohibited by the Act. By issuing its claim form, the Dockyard invoked the original jurisdiction of the court. The appeal falls within the court's inherent jurisdiction, just like a claim for breach of contract. The fact that at the time of such appeal the arbitration award is (by Article 22) still non-binding means that, by agreement, it can be reviewed in its entirety, since the cause of action cannot be said to have merged with the award.

10. There is, it is submitted, an historical analogy which demonstrates that jurisdiction in relation to appeals from arbitration awards can be conferred by agreement, without reference to any statute. Before the Common Law Procedure Act 1854 (which was the first statute dealing specifically with the court's role in arbitration) there was no inherent jurisdiction in the court to remit awards to the arbitrators for reconsideration or correction. It therefore became common for arbitration agreements to include a clause (known as a "Mr Richards' clause" after its inventor) providing for this, and creating the necessary jurisdiction by agreement, which clauses were upheld by the court (*Burnard v. Wainwright* (1850) 19 LJ QB 423).

11. The Owners' response on this last point is that the clause went no further than to provide that the arbitrators were not *functus officio* having given their award, thereby enabling the court to remit the award in a suitable case, rather than setting it aside altogether (Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn, p.438). Otherwise, the Owners' submissions can be summarised as follows. The court's power to entertain an appeal against an arbitration award is (or is now) statutory, and the only appeal permitted under the 1996 Act is an appeal on a question of law. The parties cannot by agreement confer jurisdiction where none exists, and this part of the appeal should accordingly be struck out.

Jurisdiction: discussion and conclusion

12. It is not in dispute that so far as relevant to this application, the Dockyard is seeking to appeal against factual findings—they are described in Part B of the Claim Form as "questions of fact". This is not therefore (to quote the February 1996 Report of the Departmental Advisory Committee on Arbitration) an attempt to dress up questions of fact as questions of law and by that means to seek an appeal on the tribunal's decision on the facts. These are questions of fact dressed up as questions of fact. Both parties agree that in this respect it is a novel appeal, which it certainly is, and that an appeal to the court against arbitrators' findings of fact is unknown in modern times. Similarly, (and rightly in my view, see *The Baleares*, cited in the next paragraph, at p.232) the Dockyard has not advanced a case based on the wider view of what is meant by an appeal limited to points of law that one sees in authorities in the public law field (see e.g. *E v Secretary of State for the Home Department* [2004] QB 1044, CA). Further, the argument has been about international arbitrations within Part I of the Arbitration Act 1996 (not domestic or consumer arbitration agreements within Part II).

13. The principle that the arbitrators' findings of fact are conclusive was set out very plainly in the judgment of Steyn LJ in *The Baleares* [1993] 1 Lloyd's Rep. 215. In that case, charterers' sought to appeal the arbitrators' findings on foreseeability and remoteness. This was held to be illegitimate because these were issues of fact (or, at least, mixed fact and law) and thus not appealable as questions of law. Referring at p.227-8 to an appeal under the s. 1 Arbitration Act 1979 as being on "a question of law arising from an arbitration award", Steyn LJ said:

> For those concerned in this case that is a statement of the obvious. But it matters. It defines the limits of the jurisdiction of the Court hearing an appeal under the 1979 Act. The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis

> of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of the fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact.

He went on to say that, "From time to time attempts are made to circumvent the rule that the arbitrators' findings of fact are conclusive", which he listed, saying that, "This catalogue of challenges to arbitrators' findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged" (p.228).

14. On the face of it, that rejection of any possibility of an appeal to the court against findings of fact by arbitrators is fatal to the Dockyard's appeal in this case. But Mr Bright QC prays it in aid, arguing that in the passage from the judgment that I have quoted, the rule is said to be founded on the principle of party autonomy. Why then, he asks rhetorically, should the court not entertain an appeal on the facts if the parties have agreed to it? (I shall need to come back to the question whether the parties did agree to it in this case.) That is to respect the principle, he says, not to subvert it.

15. It is true that the justification for the principle is stated in terms of party autonomy. However, Steyn LJ appears to have jurisdictional considerations in mind as well, referring to s. 1 Arbitration Act 1979 with its reference to "any question of law" as "defin[ing] the limits of the jurisdiction of the Court hearing an appeal under the 1979 Act". If Mr Bright QC is correct that the court may entertain an appeal on the facts if the parties have agreed to it, the question is as to the source of its jurisdiction. The court's jurisdiction to hear an appeal on a question of law arising out of an award made in arbitration proceedings is now contained in s.69 Arbitration Act 1996. The Dockyard's primary position is that its appeal in this case, albeit an appeal on the facts, is a s.69 appeal. This is so, it is submitted, because s.69 is a non-mandatory provision (by virtue of s.4), and is expressly stated to be subject to contrary agreement. Mr Bright QC points out that s.69 of the 1996 Act, unlike s.1 of the 1979 Act which was in issue in *The Baleares*, is qualified by the opening words, "Unless otherwise agreed by the parties …". The ambit of these words is not to be limited, he submits. They are to be read with ss. 4(2) and (3), the effect of which is that non-mandatory provisions allow the parties to make their own arrangements by agreement. That he submits is what has happened in this case, and should be given effect to.

16. The difficulty with this argument, as Mr Bernard Eder QC for the Owners pointed out, is that s. 69 (described in the heading as "Appeal on point of law"), is expressly limited to an "appeal to the court on a question of law". In that respect, it is the same in substance as s.1(2) of the 1979 Act, which was in force at the time of *The Baleares*. The explanation, he submits, for the opening words of the section is that an appeal

under s.69 is subject to restrictions. By s.69(2)(b), the appeal requires the leave of the court. But the parties are entitled by agreement to exclude an appeal altogether. The opening words, "Unless otherwise agreed by the parties …" enable them to do so should they so wish. (Two examples mentioned in Mr Bright's skeleton argument are the procedures of the ICC or of the LCIA, which exclude any right of appeal unless the parties agree otherwise). These words do not, it is submitted, give jurisdiction for an appeal other than on a question of law.

17. It is not in dispute that s.69 of the 1996 Act provides for, and only provides for, an appeal to the court on a question of law. In my view, the opening words of the section ("Unless otherwise agreed by the parties…") have to do with agreement between the parties in the context of an appeal on a question of law. The words cannot be construed as expanding the jurisdiction of the court to include an appeal to the court on a question of fact on the basis that the parties have agreed to such an appeal, and so far as I am aware, such a suggestion has not been made before in the case law or literature. I reject the Dockyard's primary contention therefore that the factual appeal in Part B of the Dockyard's claim form can stand as a s. 69 appeal.

18. The alternative jurisdictional basis contended for by the Dockyard depends on the structure and terms of Article 22 of the ship conversion contract. The argument was well paraphrased in oral submissions by the Owners as invoking the court's original jurisdiction on an inherent basis. The argument is to the effect that an appeal on the facts is not expressly prohibited by the Act, is consistent (where the parties have agreed to it) with party autonomy, and falls within the court's inherent jurisdiction, just like a claim for breach of contract. Seeking to treat the appeal to the court under Article 22 as essentially contractual in nature, the Dockyard argues that, because of the particular nature of Article 22, the appeal which is contemplated is part of the arbitral process. The appeal takes place before the award becomes final, and from a jurisdictional point of view, the court is in no different a position as when it exercises its original jurisdiction to adjudicate on a claim for breach of contract. This is in accord with the statute, it is submitted, citing s.1(b). As regards s.1(c), which provides that the court should not intervene except as provided by Part I, and upon which the Owners rely, the Dockyard submits that where (as here) the court's involvement arises because it has been written into the arbitration procedure set out in the parties' chosen arbitration clause, it is not truly an 'intervention' at all. An appeal under Article 22 of the ship conversion contract does not, it is said, involve the court 'intervening' in the arbitration. Rather, the court is part of the agreed arbitration structure.

19. Both parties therefore rely on s.1 of the Arbitration Act 1996. This section has to do with "General principles". The section provides that the provisions of Part I are founded on the principles, and "shall be construed accordingly". These, it is to be noted, are principles, not rules, and should not in my view be treated as rules. They are that, "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and (c) in matters governed by this Part the court should not intervene except as provided by this Part". I agree with the Owners that s.1(b), stating the principle of party autonomy, is concerned with the conduct of the

arbitration. This view has the support of the DAC Report at paragraph 21, which says as to the second principle that "it should in the first instance be for the parties to decide how their arbitration should be conducted". Section 1(b) is (as Mr Eder QC put it) not concerned with the role of the court, nor the interface between the court and the arbitration. Section 1(c) is the relevant provision in that regard. Any appeal to the court would (I think) be an "intervention" in the arbitration, and neither the particular structure nor the terms of Article 22 of the ship conversion contract seem to me to invalidate this analysis. Further, I agree with the Owners that there is no analogy with the position where the court exercises its original jurisdiction to adjudicate on a breach of contract—an appeal to the court from an arbitral award raises different considerations altogether, being concerned with the award, and not with the matters that gave rise to the contractual dispute in the first place.

20. Though Mr Bright QC eschewed it, saying that his case is founded exclusively on the contract between the parties, and thereby having recourse to the principle of party autonomy, I consider that Mr Eder QC was right to maintain (as he did in his oral submissions in reply) that the Dockyard can only succeed in maintaining its factual appeal if, on the basis that the parties have agreed to such an appeal, the court has an inherent jurisdiction to hear it. On that premise, the Owners' counter argument is that the Arbitration Act 1996 is a complete code, that the effect of s. 1(c) is that court's powers of intervention are limited to those given by the Act, that the court has no inherent jurisdiction to hear an appeal from an arbitral award outside the terms of the Act, and that the parties cannot by agreement confer such jurisdiction.

21. In support, the Owners rely on the decision of Mustill J in *The Chrysalis* [1983] 1 Lloyd's Rep. 503. The vessel in point was one of many trapped in the Shatt-al-Arab waterway in the course of the Iran-Iraq war. The case was one of a number that reached the courts concerning the frustration of the charters of the vessels. The question arose as to the proper scope of the appeal from the arbitrator under what was then the 1979 Act. At p.507, Mustill J analysed such an appeal by reference to the arbitrator's process of reasoning. He said:

> "Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages:'
>
> (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.
>
> (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.
>
> (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

> In some cases, the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong."

22. Mustill J then explained that it is the second stage of the process that is the proper subject matter of an appeal:

> "The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct — for the Court is then driven to assume that he did not properly understand the principles which he had stated.
>
> Whether the third stage can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. *The Nema* and *The Evia* show that where the issue is one of commercial frustration, the Court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the Court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award."

23. He went on to deal with an argument for a wider review based on the scope of the arbitration agreement in that particular case:

> "[Counsel for the charterers] has, however, contended that the position is different in the present case, because the parties had agreed in advance that there should be a right of appeal on any question of law. This shows, so it is maintained, that the parties wanted an authoritative ruling on the question of frustration and this they would not get from a mode of appeal which precluded the Judge from substituting his own opinion for that of the arbitrator on the 'judgmental' stage of the reasoning process. I am afraid that I cannot read the agreement as showing any such intention. Its obvious purpose was to save the time and expense involved in a contested application under s. 1 (3) (b) of the Act. I cannot go on to infer that the parties also wished to vary the substantive basis of the appeal, in such a way that the respondent would be more likely to

> lose than if the appeal had followed upon an unsuccessful resistance to an application brought under s. 3 (1) (b)."

24. There follows on p.507 a passage on which the Owners particularly rely in this case, because it goes to the question whether the court would have had jurisdiction if the parties had (contrary to his conclusion) agreed to a wider review:

> "Moreover, I am very doubtful whether, even if this had been the intention, it could validly have been put into effect. The Court has no jurisdiction to review the arbitrator's decision otherwise than by an "appeal" on a "question of law", and the interpretation given to these expressions in *The Nema* would preclude the Court from deciding on any basis other than the one which I have summarized."

25. In seeking to meet this obstacle, it is pointed out on behalf of the Dockyard that the agreement in *The Chrysalis* was that each party should have the right to appeal to the English High Court "... on any question of law arising out of any award made by the Arbitrator". It was not therefore a case of a clause which purported to confer jurisdiction to appeal issues of fact. It is not clear (it is said) why Mustill J felt it appropriate to express a view as to whether the parties could have validly agreed to appeal in relation to matters that were not questions of law. In any event the view expressed is obiter and not a concluded holding (merely "very doubtful"). Above all, it is said, it is apparent that he was contemplating only the jurisdiction expressly conferred by s.1(2) Arbitration Act 1979, in circumstances where the parties had entered into an agreement that was clearly intended as one falling within s. 1(3)(a) of that Act. However the statutory regime then in force contained none of the acknowledgments in the 1996 Act to party autonomy beginning with s.1(b), and did not distinguish between mandatory and non-mandatory provisions. His obiter dictum has, it is submitted, no persuasive force in the context of the 1996 Act, whose provisions make it expressly clear that the parties can validly agree to depart from the default position under the statute and substitute an alternative.

26. My conclusions as regards *The Chrysalis* are as follows. The 1979 Act applicable at the time of the decision, like the 1996 Act, only gave an appeal on a question of law. The argument was that the parties' agreement showed that they wanted an authoritative ruling on the question of frustration, and they would not get it from an appeal which precluded the judge from substituting his own opinion for that of the arbitrator on the "judgmental" stage of Mustill J's three stage reasoning process, that is, the application of the law to the facts. The court declined to read the agreement as showing any such intention, saying that its obvious purpose was to save the time and expense involved in a contested application for leave to appeal. It was in that context that Mustill J described it as "very doubtful whether, even if this had been the intention, it could validly have been put into effect. The Court," he said, "has no jurisdiction to review the arbitrator's decision otherwise than by an 'appeal' on a 'question of law'".

27. It is correct, as is pointed out on behalf of the Dockyard, that the view expressed as to jurisdiction is obiter (though expressed with the authority of Lord Mustill), and that it is not a concluded holding. Otherwise, I did not find the Dockyard's attempts to distinguish *The Chrysalis* particularly persuasive. In particular, I do not consider that

the position in this respect has been radically changed by the expression of the principle of party autonomy in s.1(b) Arbitration Act 1996, which in any case has to be read with the expression of the principle in s.1(c) that the court should not intervene except as provided by the Act. Further, the Owners' submissions are supported by academic authority in the form of Professor Merkin's *Arbitration Law*, London 2010, which states at paragraph 21.29 that, "The mere fact that the parties have agreed that there can be an appeal to the court does not mean that there can be an appeal without more: it remains the case that the conditions which apply to an appeal must be satisfied. First, the Arbitration Act 1996, s 69 applies only to appeals on points of law. It is not, therefore, open to the parties who have agreed that an appeal is to be permitted without the need for the permission of the court to be obtained, to seek to extend that right of appeal to other matters. …". That passage also supports the second part of the Owners' submissions, namely that the parties cannot by agreement confer such jurisdiction. This proposition is in any case explicit in the passage in *The Chrysalis* relied on by the Owners. A similar view is expressed in *Russell on Arbitration* (23rd edn, 2007) at p.511. Finally, s. 81(2) of the Act provides that, "Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award". Though as the Dockyard points out, this is a non-mandatory provision, it tends, I think, to support the Owners' basic contention that the Act contains a complete account of the court's powers of intervention.

28. The exclusion of a factual appeal appears to accord with the position internationally: see *Redfern & Hunter*, ibid, at p.612: "almost all states with developed laws of arbitration refuse to allow appeals from arbitral tribunals on issues of fact" (though the authors note that a somewhat broader approach is taken in Switzerland); Thomas H Webster, *Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, (2006) 22 Arbitration International 431, at p.432: "Arbitral tribunals have the right to be wrong on the merits".

29. In the light of this, I do not need to express a view on the additional case law from outside the arbitration field cited by the Owners in support of a more general principle that parties cannot by agreement confer jurisdiction on a court which the court does not otherwise possess. It is worth however noting that in the United States, albeit on different statutory wording, it has been held that private parties have no power to alter or expand the grounds identified in the Federal Arbitration Act on which a federal court might review an arbitral decision, and that a contractual provision purporting to do so is legally unenforceable: see *Kyocera Corp v. Prudential-Bache Trade Services Inc* 341 F 3d 987 (9th Cir 2003), and *Hall Street Associates LLC v. Mattel Inc* (2008) 552 US 576 (Sup Ct), discussed in *Redfern & Hunter on International Arbitration*, 5th edn, (OUP, 2009), at p.612 et seq.

30. I accept the Dockyard's basic point that the court seeks to support the parties' agreement to arbitrate according to the terms of their agreement. I also accept that the limits of the court's inherent jurisdiction (in this or any other context) are not always plain, and that the situations in which the court may be called upon to act are not readily foreseeable. The arbitral process, and the court's role in supporting it, is a dynamic one, responding to the changing needs of international commerce. However

it is clear that under English law (to adopt the phrase used by Mustill J) it is very doubtful that the court has jurisdiction to hear an appeal from arbitrators on questions of fact, even if the parties were to agree to such an appeal. As in *The Chrysalis*, it is only necessary to go further than that if the parties here did agree to an appeal on the facts. That depends on the meaning of Article 22 of the ship conversion contract of 7 November 2007. For reasons which I shall explain next, I have concluded that they did not agree to such an appeal. That being so, it is unnecessary to say any more on the jurisdictional issue.

The construction of Article 22

31. I have set out the full text of Article 22 of the ship conversion contract of 7 November 2007 above. The parties agreed in Article 22.3 that "arbitrations shall be conducted in accordance with the then current Rules of the LMAA and the Arbitration Act 1996. The Parties agree that either Party may appeal to the English High Court on any issue arising out of any award". The question is what is meant, applying the established rules of construction (as to which there is no dispute) by the words, "any issue arising out of any award". In short, does it extend to any issue, including any issue of fact?

32. In its submissions, the Dockyard accepts that an appeal on a question of law under s. 69 is a well-known feature in the legal landscape and that the parties must be assumed to have been familiar with its terms. However it submits that someone legally literate who merely wanted to enter into an agreement within s. 69(2)(a) would not do so in the terms and language adopted in Article 22.3. Various standard terms in use internationally are cited which identify the kind of point that the parties agree to be appealable as of right as a "question of law". Yet, it is submitted, Article 22.3 is "startlingly different" because, (1) the qualification "of law" has been omitted, (2) the choice of noun is "issue" rather than "question", and, (3) instead of "of law", the modifier attached to "issue" is the word "any", a word, it is submitted, only used with the intention of expanding the potential application of the noun to which it relates. Article 22, it is said, creates a coherent scheme, agreed between the parties, with Class related matters determined in a single stage process, and for other matters the court to have a function as the upper tier of a two-tier system of dispute resolution, but with the ultimate result being embodied in an award (for enforcement purposes). The Dockyard cites the well known authorities on construction, submitting that in commercial terms it is perfectly sensible and legitimate for the parties to agree an appeal on any issue including any factual issue, and it is not for the court to substitute a different bargain.

33. The Owners submit that even if it were possible for the parties to agree to clothe the English Court with power to review decisions made by an arbitration tribunal on issues of fact, that is not what the parties have done in this case. One of the most basic and longstanding tenets of the arbitral process (both in England and internationally) is that findings of facts are the exclusive province of the arbitrators. The starting point, therefore, is that it would require clear words to achieve this result. It must be assumed that the parties' intention was to fit within the usual appeal regime found in the 1996 Act, not to create some new and freestanding right of appeal. If the latter were the intention, it might be expected that the parties would also stipulate for the manner in which any such appeal was to approach factual questions. In the

present case, no clear words demonstrating such an intention are to be found in Article 22. On the contrary, it is obvious that all the parties intended here was to dispense with the need to obtain permission if a party wished to bring an appeal on a question of law pursuant to s.69 of the Act. The words "any issue" in Article 22 are to be read as meaning "any issue susceptible of appeal". They do not extend to factual findings. This (it is said) is the only construction consistent with the fact that the parties have by Article 22 agreed expressly that "all arbitrations shall be conducted in accordance with ... the Arbitration Act 1996", since the Act does not allow for appeals from findings of fact.

34. My conclusion on the construction question is as follows. As Mr Eder QC put it in oral submissions, it cannot sensibly be suggested that at the time the ship conversion contract was entered into, the parties intended to agree to an appeal to the court of literally *any* issue arising out of an award. That being so, the court's task is to construe the language used so as to give effect to the parties' objective intention. I accept that so far as this issue is concerned a circular approach, reasoning that since a factual appeal is impermissible, the parties cannot have intended it, should be avoided. Nevertheless, for all the reasons set out above, it is in practice axiomatic that arbitrators' factual findings are not subject to an appeal to the court. In those circumstances, clear provision would have to be made in a contract before it could be concluded that the parties had reached such an agreement (compare *Sabmiller Africa v. East African Breweries* [2009] EWCA Civ 1564; [2010] 2 Lloyd's Rep. 422 at [11]). Against that background, the fact that the words "of law" are not attached to the words "any issue" in Article 22.3 seems to me to be of limited significance. Nor do I think that the term "issue" as used here is materially different from "question". Construed in context, and taking account the reference in the sentence before to arbitrations being conducted in accordance with the Arbitration Act 1996, it is plain in my view that what the parties intended here was to dispense with the need to obtain permission for an appeal on a question of law pursuant to s.69 of that Act. That is an outcome that is commercially unsurprising. There is nothing in the language used which is apt to warrant a wider construction.

Conclusion

35. It follows from the above that the Dockyard's appeal on the facts (that is, Part B of the Claim Form) should be struck out. I am grateful for the assistance that I have received from both parties. I will hear the parties as to the precise form of the order to be made, and any consequential matters arising.