Neutral Citation Number: [2012] EWHC 1067 (Comm)

Case No: 2011-1321

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2012

Before :

MR JUSTICE ANDREW SMITH

- -

Between :

Lombard North Central PLC & anr	**Claimants**
- and -	
GATX Corporation	**Defendants**

- -
- -

Mark Hapgood QC and Alexander Pelling
(instructed by **Berwin Leighton Paisner LLP**) for the **Claimants**
Iain Milligan QC and Michael Collett
(instructed by **Sidley Austin LLP**) for the **Defendants**

Hearing date: Friday 20 April 2012

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Judgment

Mr Justice Andrew Smith:

1. I shall refer to the two claimant respondents (represented by Mr. Mark Hapgood QC and Mr. Alexander Pelling) simply as "Lombard" because they need not be distinguished. I shall refer to the defendant applicants (represented by Mr. Iain Milligan QC and Mr. Michael Collett) as "GATX".

2. Lombard and GATX were party to arrangements first made in 1998 about financing train vehicles: GATX agreed to provide a so-called Residual Value Guarantee ("RVG") and other services, and claim that after the "Residual Value Date", 30 March 2012, they would have been entitled to a share of the profits from the sales or leases of the trains. They were also among the parties to an agreement called the Further Trains Agreement dated 14 July 2000 (the "2000 agreement"), as was Halifax Leasing (September) Ltd ("Halifax"). Clause 9.4 of the 2000 agreement concerned the ownership, leasing and management of the trains after the Residual Value Date, and it allowed GATX in some circumstances to force a sale of them to ascertain their value and so to realise their share of the profits (if any). In 2004, by an agreement dated 6 April 2004 (the "2004 agreement"), the parties to the 2000 agreement made amendments to parts of it, including clause 9.4.

3. Mr. Hapgood attached some significance to the background to the 2004 agreement. I shall set out the relevant part of his written submissions rather than put it in my own words so as to avoid appearing to take a view about the accuracy or completeness of what is said, lest that be misunderstood at any future hearing. I can proceed on the basis that what is stated in the submissions is correct without so deciding.

> "11. On 12 September 2003 [Lombard], Halifax and [GATX] entered into a non-binding term sheet ("the Term Sheet") … in which they set out the steps to be taken in two principal eventualities: (i) if the lessors of the trains, namely Lombard Leasing and Halifax, entered into U.S. lease to service contracts ("LTSCs") - which would be expected to confer certain tax and commercial benefits - and (ii) if the CrossCountry lease were extended by ten years to 1 April 2022 …
>
> 12. In the Term Sheet they also contemplated some arrangements for the sharing of profits in the event that the LTSCs were entered into but there was no extension to the CrossCountry lease …. These included amendments to the [2000 agreement] whereby the parties would undertake to create a joint venture ("JV") for the purpose of leasing the trains after 31 March 2012 and sharing the proceeds thereof by reference to the "Lessors' remaining investment balances" although this term was never defined.
>
> 13. In fact an LTSC was entered into by Lombard Leasing in September-November 2003, by which it refinanced the capital cost of the trains by buying the trains outright and then selling them. The trains were then leased back to it and leased

> on to Voyager as before. In order to benefit from the LTSCs, however, it was necessary for Lombard Leasing to ensure that the trains could not be sold while the LTSCs were in effect …
>
> 14. A Lease Enhancement Fee of £625,000 was therefore paid to [GATX], in consideration for which [GATX] inter alia waived its rights under the RVG to call for the sale of the trains on 31 March 2012 …. Correspondingly, [Lombard] agreed not to make a demand under the RVG without [GATX's] consent – effectively releasing [GATX] from liability under the RVG ….
>
> 16. The result of all these changes was that [GATX] was left in a position where it effectively could no longer be made liable under the RVG without its own consent; it had given up its right to force a sale but had been paid a Lease Enhancement Fee for that (and for co-operating with the LTSCs generally) of £625,000. Perhaps surprisingly, it still retained the possibility of sharing in profits after the end of the original CrossCountry lease in April 2012."

4. The important parts of the amended clause 9.4 are the introductory words, sub-clause (i) and sub-clause (x). However I should set out most of the clause.

> "The parties hereto agree that the leasing and sale of the Vehicles following the Residual Value Date, whether or not a written demand under the RVG is made on the Residual Value Date, shall be conducted in accordance with the provisions of this Section 9.4:
>
> (i) If no arrangement to extend the leasing of the Vehicles is put in place with the Strategic Rail Authority by 30 March 2004, then, no later than 30 June 2011, GATX, Halifax and Lombard shall establish a joint venture (the JV), in a form and manner acceptable to the parties thereto; provided, however, that such JV achieves the commercial and legal objectives set forth in this Clause 9.4 and the arrangement does not impose on any party hereto a greater burden than any alternative arrangement or structure that can achieve the same objectives. If the parties agree that a JV cannot be established that can achieve the objectives of this Clause 9.4 or the parties have been unable to establish a JV by 30 June 2011, the parties agree to negotiate in good faith to achieve such objectives through other means at the earliest opportunity.
>
> (ii) The business of the JV shall be to arrange the leasing of Vehicles after the Residual Value Date, and to arrange subleases of such Vehicles to third parties during the remainder of the US Restructurings and to enter into agreements with the members of the JV to share in the proceeds of such leases and of any sale of the Vehicles by the Current Owners.

(iii) The JV shall provide that GATX, Halifax and Lombard (the Members) shall share in any profits and losses of the JV in their respective proportional (sic) (being 50:25:25 (the Sharing Proportion)).

(iv) The Relevant Lessors shall offer, in writing to be delivered to GATX with a copy to each Member no later than 30 September 2011, to share the profit and losses from leases of the Vehicles with the JV for the period after 1 April 2012, and GATX shall have the right, in its sole discretion, to elect to accept such offer on behalf of the JV, by notice in writing to the Relevant Lessors no later than 30 December 2011. The Relevant Lessors' offer shall state that the terms of any leases of Vehicles (a JV Lease) shall be agreed in accordance with Clause 6 hereof save for the sharing arrangements set out therein, which shall not apply. The profits and losses of such leases shall be available for sharing between the members of the JV in their Sharing Proportions. The profits and losses shall be calculated by deducting from the rental income from such JV Lease all amounts due as priority payments to the Relevant Lessors (Relevant Lessor Amounts), which amounts shall be calculated using software substantially similar to Classic Lease Pricing currently used by Lombard and the [specified] assumptions …

(v) The JV will act as agent for the purposes of releasing the Vehicles and can delegate to an agent selected by a majority in interest of the Members and the terms of the sharing arrangements shall be approved by a majority in interest of the Members….

(vi) …

(vii) If either of the Relevant Lessors decides to sell its Vehicles or its respective interests therein, it shall appoint an agent to act as the sales agent to arrange the sale of the Vehicles. The identity of the sales agent shall be approved by GATX prior to its appointment. If GATX is appointed as sales agent it shall be entitled to appoint a sub-agent, provided that the identity of such sub-agent is approved by the Relevant Lessor in its absolute discretion. The Relevant Lessors shall cause the Current Owners to allocate the proceeds of such sale (after deducting any costs and expenses in connection therewith) in excess of the relevant Lessor's remaining investment balance as follows: ….

(viii) GATX shall have the right to withdraw from the JV after a Trigger Event and upon such withdrawal all of its rights and obligations in the JV shall be apportioned equally between

> the remaining Members, who shall then have the right to dissolve the JV at their election.
>
> (ix) GATX shall have no liability to the Relevant Lessors or any of the Members, following any such withdrawal under (viii) above, in respect of shortfalls in Relevant Lessor Amounts and interest thereon arising prior to a Trigger Event.
>
> (x) Any disputes relating to the creation of the JV pursuant to this Clause 9.4 that cannot be resolved by the good faith efforts of the parties shall be referred to and finally resolved by arbitration in London. Such arbitration shall be decided pursuant to the Rules of the London Court of International Arbitration from time to time in force."

5. With regard to clause 9.4(i), it is common ground that:

   i) No arrangement with the Strategic Rail Authority to extend the leasing of the trains was put in place by 30 March 2004; and

   ii) No joint venture (as contemplated by clause 9.4(i)) was established by 30 June 2011.

6. Clause 9.4(x) refers to the Rules of the London Court of International Arbitration (the "Rules"). They include the following:

> "22.3 The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate."
>
> "22.4 The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono," "amiable composition" or "honourable engagement" where the parties have so agreed expressly in writing."
>
> "23.1 The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause."
>
> "23.4 By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court

> or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority."

7. The parties disagree about the scope of the arbitration agreement. Lombard say that it was intended only to resolve disputes about "how the [Joint Venture] should be constituted, rather than disputes about the [2004 agreement] itself", as Mr Hapgood put it in his written submissions. He continued, "[The arbitrators] were not to resolve disputes under an *existing* contract, but rather to determine the terms on which a *future* contract should be made". GATX give the arbitration agreement a wider application: by way of illustration only, they say that it covers a dispute about whether the relevant parties have been "unable to establish a [Joint Venture] by 30 June 2011" within the meaning of clause 9.4(i) and any disputes not only about the terms of a Joint Venture but also about terms of any alternative arrangement or structure constituting "other means". (Thus, both parties, as I understand it, say that the arbitration agreement covers disputes about future arrangements, Rule 22.3 and Rule 22.4 notwithstanding.)

8. Lombard have brought these Part 8 proceedings against GATX. Halifax are not party to them, but I was informed that they are aware of the proceedings and of this application. In the proceedings, as now amended, Lombard seek these two declarations:

> "The effect of sub-clause 9.4(i) of the Further Trains Agreement relating to DEMU Trains dated 14 July 2000 and amended on 6 April 2004 ("the FTA"), is that, because of the parties' failure to establish by 30 June 2011 a JV (joint venture) within the meaning of that sub-clause, the claimants' sole obligation under clause 9.4 of the FTA is an obligation to negotiate in good faith and, as such an obligation is unenforceable for want of legal content, [GATX] is not entitled under the said clause 9.4 or any of its sub-clauses to share in any profit."

and

> "The amendment of the FTA by the Deed of Amendment between the parties dated 6 April 2004 takes effect in its entirety notwithstanding (i) the unenforceability of the obligation to negotiate referred to in paragraph 1 hereof and/or (ii) the provisions of clause 5 of the said Deed of Amendment, which clause provides that save as expressly amended by the said Deed the FTA shall remain in full force and effect."

9. Thus, by the first declaration Lombard seek a declaration that, if the conditions to bring into play the second sentence of clause 9.4(i) are met, they are not subject to any legally enforceable obligation under it (or any other provision of clause 9.4) because, as Mr Hapgood explained citing Walford v Miles, [1992] AC 128, an agreement to

negotiate in good faith "has no legal content". The second declaration concerns whether, if the agreement to negotiate in good faith is unenforceable, nevertheless the amendments in the 2004 agreement take effect (notwithstanding clause 5 provided "Save as expressly amended by this Deed, the [2000 agreement] shall remain in full force and effect"). I am not concerned with how these questions should be decided. I need only refer to Mr Milligan's submission (which Mr Hapgood did not dispute) that it is relevant when deciding whether an agreement is too uncertain to be enforceable to consider any provision for uncertainties to be resolved by arbitration: see Rix LJ in Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD, [2001] EWCA Civ 406 at para 14viii.

10. GATX, relying upon clause 9.4(x) of the agreement of 6 April 2004, apply for a stay of the proceedings under section 9 of the 1996 Arbitration Act (the "1996 Act") and, additionally or in the alternative, a stay under the court's inherent jurisdiction. It is not argued that article 23.4 of the Rules or the parties' agreement to them by the 2004 agreement precludes them from doing so. By section 4(1) of the 1996 Act and schedule 1 to it, the provisions of section 9 are mandatory, regardless of any agreement of the parties.

11. Section 9 of the 1996 Act, so far as is relevant, provides as follows:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter…
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed…"

12. Thus, an applicant for a stay must make the application before taking a step in the action and show (to the civil standard) that (i) there is an arbitration agreement; (ii) he is party to it; and (iii) the legal proceedings are "in respect of" a matter which under the agreement is to be referred to arbitration (or is a "referred matter", as I shall call it). If he does so, the respondent may seek to satisfy the court that the arbitration agreement is null and void, inoperative or incapable of being performed.

13. In general terms the purpose of section 9 is to uphold the parties' agreement to arbitration and to prevent a claimant pursuing proceedings in contravention of it against a party who objects. More specifically, it is apparent from the section that:

    i) Legal proceedings as a whole may be "in respect of" a referred matter although the proceedings concern both that and other matters. In those

circumstances the proceedings are stayed "so far as" they concern the referred matter.

ii) The applicant is to apply for any stay before the issues in the proceedings are identified in a defence or subsequent pleadings.

14. There is no judicial authority of which counsel or I know that directly considers the meaning of "in respect of" in section 9(1) or how the court determines whether proceedings are in respect of a referred matter. The question of course depends upon the nature of the claim (or claims) made in the legal proceedings, but not, I think, only on the formulation of it (or them) in the claim form and any pleadings. That would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded. In written submissions for Lombard Mr. Hapgood referred to the purpose for which Lombard seek the declarations, but he did not suggest in oral argument that the claimants' subjective purpose in bringing proceedings is relevant to determining an application under section 9, and in my judgment it is not. Mr. Milligan's approach was that the court should consider what questions will foreseeably arise for determination in the proceedings and whether they include referred matters. I agree with him.

15. It seems to me that, if the parties have agreed to refer a matter to arbitration, a party who so wishes should be entitled to have the agreement upheld and to have the court stay the proceedings for that purpose (at least unless he could have no real or proper purpose for so wishing – a possible qualification that would not apply in this case). This is a principle underlying the 1996 Act: see section 1(b). I therefore do not consider that proceedings are "in respect of" a referred matter only when they are mainly or principally to resolve a dispute about a referred matter. This view is, I think, at least consistent with the decision of the Court of Appeal in Fulham Football Club (1987) Ltd v Richards and anor, [2011] EWCA Civ 855, where the Court of Appeal considered that a question whether proceedings under section 994 of the Companies Act 2006 asserting unfair prejudice should be stayed depended upon whether the arbitration agreement was inoperative under section 9(4) rather than upon whether the proceedings were covered by section 9(1). Although Patten LJ said (at para 36) that, "Section 9(1) is concerned only to identify the existence of an arbitration agreement which in terms covers the matters in dispute as the preconditions (sic) for the making of the stay application", the section refers to *a matter* in dispute, not to *the matters* in dispute. Whatever Patten LJ's reason for departing from the statutory language, I do not understand him to mean that it is a precondition to a stay application that all the matters in dispute be referred matters.

16. This might lead to legal proceedings in which a referred matter is in issue being stayed while that matter, or issue, is referred to an arbitral tribunal, and then resuming when it has been resolved in accordance with the parties' agreement. This might be inconvenient and result in additional costs and some delay, but that is the price of respecting the parties' agreement and a risk that they are taken to have chosen to take: see Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd, [1993] AC 334 at p.353A-D per Lord Mustill. It might be a reason for interpreting arbitration agreements expansively rather than restrictively so as to avoid a conclusion that the parties intended that disputes should be determined in more than one forum: Fiona

Trust v Privalov [2007] UKHL 40 at paras 13 and 14 (per Lord Hoffmann) and at para 26 (per Lord Hope). But where, as here, the parties have certainly agreed to refer to arbitration only certain disputes that might arise from their relationship (only "disputes relating to the creation of the [joint venture] pursuant to … Clause 9.4 [of the 2004 agreement] …."), the risk of proceedings before both the courts and an arbitral tribunal is inherent in the agreement.

17. It does not follow that, wherever legal proceedings involve dispute about a referred matter, the defendant will necessarily be able to have them stayed however peripheral the referred matter might be to the proceedings as a whole. It might be that, while the referred matter is stayed for determination in arbitration, the proceedings could otherwise proceed. But it is not suggested that these proceedings should be partly stayed: Lombard accept that, if GATX are entitled under section 9 to a stay of the claim for the first declaration, then the claim for the second declaration should also be stayed under the court's inherent jurisdiction, if not under section 9.

18. I add that it would be inconsistent with the principles governing the 1996 Act for the court to assess whether the applicant has an arguable case on any referred matter: it is concerned only whether there is a referred matter, in this case whether there is a "dispute" of the kind specified in clause 9.4(x), and not concerned with the merits or arguability of the parties' contentions with regard to it.

19. The basis for GATX's argument for a stay under section 9 is that, as is not disputed, by agreeing to the Rules, the parties agreed that the jurisdiction of any arbitral tribunal should be determined by that tribunal and not by the court (or other judicial authority). Mr Milligan submitted that, this being so and given that the proceedings have raised a dispute between the parties about the scope of the arbitration agreement, it necessarily follows that the proceedings are "in respect of" a referred matter. Therefore, he argued, the proceedings should be stayed in order to uphold the parties' agreement that the jurisdiction of arbitral tribunals appointed under clause 9.4(x) should be determined by the tribunals themselves and not elsewhere. I am not persuaded that for this reason alone the proceedings are within section 9(1). The fact that the proceedings have manifested a difference between the parties about something does not in itself mean that the proceedings are "in respect" thereof. And the fact that as a result of proceedings (or proposed proceedings) a dispute about a referred matter has emerged between the parties does not necessarily mean that the court will be asked to determine it in the proceedings. This is no less so where the referred matters include disputes about the scope of the arbitration clause, and so disputes about the arbitrators' jurisdiction. However, Mr Milligan had a more specific argument that I accept: that, since the question whether the agreement to negotiate is enforceable will involve consideration of whether the arbitration agreement covers the subject matter of the contemplated negotiations (and so whether, in light thereof, the agreement to negotiate is too uncertain to have legal effect), the claim for the first declaration will, unless it is stayed, draw into the legal proceedings a referred matter, the scope of the arbitration agreement; and therefore the proceedings are, at least to that extent, in respect of that referred matter.

20. I should add that Lombard do not contend that any difference between Lombard and GATX about the scope of the arbitration agreement does not amount to a "dispute" within the meaning of clause 9.4(x), but is only an aspect of a dispute. I would have

rejected such a suggestion, which would introduce a semantic distinction between a "difference" and a "dispute" reminiscent of the "fussy distinctions" deprecated in Fiona Trust v Privalov, loc cit at para 12 (per Lord Hoffmann) and para 27 (per Lord Hope).

21. I therefore conclude that the proceedings by way of the claim for the first declaration are within section 9(1) of the 1996 Act, and that GATX are entitled to a stay of the proceedings to that extent, subject to Mr Hapgood's argument that the arbitration agreement is inoperative. As I have said, Mr Hapgood accepted that in these circumstances the whole proceedings should be stayed.

22. I come therefore to whether I am satisfied that the arbitration agreement is inoperative. Mr Hapgood's starting point was Lombard's contention that the arbitration agreement is concerned only with a machinery to resolve disputes about what the terms of the joint venture to be agreed before 30 June 2011 should be. (In support of this he invoked the term sheet of 30 September 2003, including a proposed arbitration agreement. For present purposes, I do not need to express an opinion about whether this is admissible evidence about the meaning of clause 9.4(x) or whether, if it is, it would assist Lombard; and, since the interpretation of the arbitration agreement is a referred matter, I should refrain from doing so, however obvious the answer might appear.) Mr Hapgood argued that therefore, when no joint venture had been agreed by 30 June 2011, the arbitration agreement was spent and therefore inoperative, except, as Mr Hapgood acknowledged, with regard to any reference already made by then. This was said to follow from Lombard's interpretation of the arbitration agreement. But their interpretation is disputed, and so the corollary of this argument is that the court should engage with the dispute about interpretation in order to be satisfied that the arbitration agreement is inoperative.

23. I reject that argument for two reasons. First, there is Court of Appeal authority that, where a respondent to an application to stay proceedings contends that an arbitration agreement is null and void, inoperative or incapable of being performed, nevertheless a stay should be granted if the applicant "can raise an arguable case in favour of validity": see John Downing v Al Taneer Establishment and anr, [2002] EWCA Civ 721 at para 20 per Potter LJ, with whom other members of the Court agreed. Potter LJ cited as authority for this Hulme v AA Mutual International Insurance, [1996] LRLR 19, and it has been questioned whether the Hulme case justifies this proposition: see the Albon case (cit sup) at para 22. However that may be, I must respect the authority of the Court of Appeal and apply that test that Potter LJ stipulated. I express no conclusion about the merits of Lombard's more restrictive or GATX's more expansive interpretation of the arbitration agreement: that is the territory of an arbitral tribunal. It suffices to say that I consider the latter arguable, and Mr Hapgood did not submit otherwise.

24. Secondly, I do not consider that, assuming Lombard's interpretation of the agreement is correct, the arbitration agreement would be inoperative within the meaning of section 9(4): it simply would not cover the dispute that has arisen. An arbitration clause is not "inoperative" simply because a dispute does not fall within its scope, even if no referred matter could any longer arise. Counsel cited no authority about the meaning of "inoperative", but section 9(4) of the 1996 Act is in similar terms to the New York Convention (on the Recognition and Enforcement of Foreign Arbitration

Awards of 10 June 1958) and is based on the Model Law (on Arbitration drafted by UNCITRAL and adopted by the United Nations in June 1985). It covers circumstances in which the party seeking to invoke the arbitration agreement is not entitled to do so: one example is where the party has waived the right to invoke it (see AED Oil Ltd v Puffin FSPO Ltd, (no 2) [2009] VSC 534) or otherwise lost the right to make reference. Other circumstances in which an arbitration agreement is inoperative are described by Prof. Merkin in Arbitration Law (2011) at para 8.33.2 and include cases where the arbitration agreement has been terminated by an accepted repudiation, cases where the dispute is incapable of being determined by arbitration, and cases where the arbitration will not be enforced by the court (for example because a named arbitrator is actually or apparently biased). See too Prof. Margaret L Moses, The Principles and Practice of Commercial Arbitration (2nd Ed, 2012) at p.34. I know of no academic support for Mr Hapgood's wide interpretation of this exception and I reject it. The scope of an arbitration agreement is covered by the requirements of section 9(1), and I cannot accept that the question should be re-visited under section 9(4), especially since the court would then be applying a different burden and, apparently, a different standard of proof.

25. Therefore, subject to the last paragraph of my judgment, I grant GATX's application because GATX are entitled under section 9 to have the claim for the first declaration stayed.

26. Mr Milligan argued that in any event the proceedings should be stayed under the court's inherent jurisdiction. The inherent jurisdiction to stay proceedings is not displaced by the regime of section 9, and it is available where "good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first", per Waller LJ in Al-Naimi v Islamic Press, [2000] 1 Lloyd's Rep 522,525. It has been said that it is to be exercised "only exceptionally" or "in very exceptional cases" (see the Albon case, cit sup, at para 24). That is because, given the statutory scheme, the court will not exercise its inherent jurisdiction inconsistently with the principles governing that scheme, and generally the statute provides for a stay in circumstances where the statutory principles would warrant one. In Etri Fans Ltd v NMB (UK) Ltd, [1987] 1 WLR 1110 Woolf LJ described the inherent jurisdiction as a "residual one principally confined to dealing with cases not contemplated by the statutory provisions" (at p.1114).

27. If I am wrong that these proceedings meet the "threshold requirements" of section 9(1), then I would conclude (subject again to the qualification at the end of this judgment) that they should be stayed under the inherent jurisdiction in order to uphold the parties' agreement that the jurisdiction of an arbitral tribunal should be decided only by the tribunal (although the court might achieve the same end by making an injunction to restrain the claimant from pursuing the proceedings in so far as this involves a breach of the agreement). In Arbitration Law (2011) at para 8.68 Prof. Merkin states that the inherent jurisdiction might be exercised in just such circumstances. If necessary, I would categorise them as "exceptional" or even "very exceptional". I would also suppose that the statutory provisions did not contemplate an agreement including such a term.

28. The dispute in this case is, after all, about the scope of the arbitration agreement, and it was recognised by HHJ Lloyd in Birse Construction Ltd v St David Ltd, [1999]

BLR 194 **(**whose judgment Waller LJ cited with approval in the Al-Naimi case, loc cit at p.524) that such cases are more likely to be stayed than cases where it is disputed whether the parties made an arbitration agreement at all. Mr Milligan also demonstrated that referred matters are closely bound in with other issues in the proceedings: this is sufficiently exemplified by the dispute about whether the parties were "unable" to establish a Joint Venture by 30 June 2011 and the question whether a tribunal would have jurisdiction to determine arrangements "by other means".

29. I would not have exercised the inherent jurisdiction to stay the proceedings if I had been satisfied that the arbitration agreement is "inoperative" within the meaning of section 9(4). It would go against the statutory scheme to stay proceedings for arbitration if the scheme so categorised the arbitration agreement.

30. However, GATX do not need to rely upon the inherent jurisdiction with regard to the proceedings for the first declaration. They are entitled under section 9 to have the proceedings stayed to that extent, and it is uncontroversial that therefore the whole proceedings should be stayed. (If I stayed the claim for the first declaration under the inherent jurisdiction, I would also stay the claim for the second declaration, because sensible case management would so demand.)

31. In so concluding, I have supposed (as was, I think, implicit in GATX's submissions) that they will not prevent their dispute with Lombard coming before an arbitral tribunal (if it cannot be resolved consensually); and that, if they do not themselves bring a reference, they will not obstruct Lombard in doing so or take any point that Lombard, by bringing a reference, have conducted themselves inconsistently with their contention that the arbitration agreement does not provide for any reference after 30 June 2011. I shall hear submissions about whether, and if so how, this concern should be covered in my order.

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