Neutral Citation Number: [2013] EWHC 1240 (Comm)

Case No: 2013- FOLIO 126

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

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 16/05/2013

Before :

THE HON. MR JUSTICE POPPLEWELL

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Between :

Golden Ocean Group Limited	**Claimant**
- and -	
(1) Humpuss Intermoda Transportasi Tbk Ltd	
(2) Genuine Maritime Ltd	**Defendants**

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- -

Steven Gee QC & Tom Whitehead (instructed by **Brookes & Co**) for the C**laimant**
Nicholas Craig (instructed by **Lipman Karas LLP**) for the **Second Defendant**

Hearing dates: 26 April, 1 May 2013

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Judgment

The Hon. Mr Justice Popplewell:

1. This is an application for permission to serve an arbitration claim form out of the jurisdiction on the First and Second Defendants and for an interim "anti-arbitration" injunction to restrain the Second Defendant from pursuing arbitration proceedings in Singapore. The application is made ex parte on notice so far as concerns the First Defendant, who did not appear and was not represented, but inter partes so far as concerns the Second Defendant.

2. The application arises out of a dispute as to which of the Defendants was party as disponent owner to a charterparty under which the vessel "BARITO" ("the Vessel") was chartered to the Claimant in March 2008 for 11 to 13 months.

3. The Claimant ("Golden Ocean") is a Norwegian company based in Bermuda, which is involved in dry bulk shipping worldwide. The First Defendant ("HIT") is the ultimate parent company of the Humpuss group of companies. It is a publicly traded company registered in Indonesia and managed from Jakarta. According to its 2008 accounts its

business mainly involved transporting LNG, oil, chemicals, containers and other cargoes, as well as providing crewing and management services to vessel owners. Part of the group's business relating to ship owning and chartering was carried on by a wholly owned subsidiary, Humpuss Sea Transport PTE Limited ("HST"), a company incorporated and managed in Singapore. HST's principal activity, according to the 2008 accounts, was time chartering vessels. HST had a number of wholly owned operating subsidiaries which included the Second Defendant ("Genuine") and Heritage Maritime Limited ("Heritage"). Genuine is a Panamanian company whose business is described in the 2008 accounts as dry bulk transportation services. Since January 2012 HST has been under the control of liquidators appointed by the High Court of Singapore, as therefore have its subsidiaries, including Genuine.

4. The fixture of the Vessel was recorded in an email dated 18 March 2008 from the owner's brokers, Simpson Spence and Young ("SSY"), to Golden Ocean and HIT. The fixture was negotiated on Golden Ocean's behalf by Michael Joergensen in its chartering department, and on behalf of owners by Bobby Andikha, who was a director of both HIT and HST. Mr Joergensen's evidence is that Golden Ocean had had an unhappy experience with a previous fixture of a vessel from Heritage, the "Mahakam"; and that as a result, both he and Mr Zorn, the managing director of Golden Ocean in Singapore, made clear to Mr Drachmann of SSY during negotiations that they were only prepared to contemplate another fixture if it was with HIT itself as a listed company. The fixture recap email was addressed by SSY to Mr Andikha at HIT. A subsequent email from Mr Drachmann appears to confirm that he regarded his instructions as coming from Mr Andikha acting on behalf of HIT.

5. The recap set out some of the terms and concluded by providing that otherwise the terms were to be those of the last charter "between Owners and Chrts with logical changes." This was a reference to the Mahakam charter under which Heritage was named as the disponent owner. The charter contained at clause 17 a provision that any dispute be referred to arbitration in London and that the charter was to be governed by English law.

6. The Vessel was delivered into the charterparty on 2 August 2008. During the currency of the charter, hire was paid by Golden Ocean to an account in the name of Genuine, pursuant to details provided to Golden Ocean by SSY. On a number of occasions letters of indemnity were provided by Golden Ocean to enable cargo to be discharged in the absence of bills of lading. These were made out in favour of Genuine, pursuant to wording in that form again provided by SSY.

7. In early 2009 Golden Ocean alleged that the Vessel was off hire. The Vessel was redelivered in March 2009, some 4 months before the expiry of the charterparty period. Golden Ocean has made claims totalling approximately US$1.8 million in respect of overpaid hire and the value of bunkers remaining on board on redelivery. These claims are made against HIT whom Golden Ocean contends is the disponent owner under the charterparty. Cross claims have been made by Genuine for damages for early redelivery of the vessel in a sum exceeding US$ 6 million. This claim is made against Golden Ocean on the basis of Genuine's case that it, not HIT, was the disponent owner under the charterparty.

8. After the Vessel had been redelivered, on 5 June 2009 Golden Ocean commenced Rule B attachment proceedings in New York against Genuine. These were prepared

by Golden Ocean's FD&D Club, Nordisk Defence Club (Singapore) Pte Ltd ("Nordisk"), on the basis of documents provided by Golden Ocean, and in particular a draft working copy of the charterparty which had been provided to Golden Ocean by SSY under cover of an email of 26 May 2009. This named Genuine as the owner. There was also an unsigned addendum extending the laycan of the vessel which named HST as the owner. It is Golden Ocean's case that Nordisk was in error in identifying Genuine as the contracting owner, and this error was caused by Golden Ocean having been sent the draft working copy of the charterparty by SSY, after the charterparty had expired, which identified Genuine as the owner.

9. On 18 June 2009 Nordisk, acting on behalf of Golden Ocean, wrote to Genuine advancing claims against Genuine and making a demand for arbitration in London. Again this is said to have been an error by Nordisk consequent upon the draft working copy of the charter sent by SSY which identified Genuine as the owner. The notice was rejected by Thomas Cooper acting on behalf of Genuine on grounds that it had not been properly served.

10. On 22 September 2009 a settlement meeting took place between Golden Ocean and Genuine in relation to the underlying disputes but no agreement was reached. By a letter of 23 September 2009, Nordisk gave a second notice of commencement of London arbitration against Genuine under the charterparty. Shortly thereafter Genuine commenced proceedings against Golden Ocean in Indonesia in support of its claim for early redelivery and arrested a vessel chartered by Golden Ocean, the "Golden Joy", in order to secure that claim. This gave rise to further meetings, which culminated in an addendum dated 8 March 2010 ("the Addendum") being signed by Golden Ocean and Genuine. The Addendum, which is at the heart of the dispute on the current application, was in the following terms:

"Addendum to the Charterparty

This agreement is entered into this 8th day of March 2010 between Genuine Maritime Ltd., SA of the first part and Golden Ocean Group Limited of the second part.

WHEREAS

1. The parties entered into a Charterparty for the "BARITO" on 18 March 2008.

2. Owners have commenced legal proceedings in Indonesia in respect of disputes arising out of or in connection with the Charterparty.

3. Charterers have commenced arbitration proceedings in London in respect of their claims/counterclaims and have made an application to the English High Court of Justice to have their arbitrator appointed as the sole arbitrator.

4. The parties now wish to have all disputes determined in arbitration in Singapore and thus wish to amend the arbitration clause in the Charterparty.

NOW IT IS HEREBY AGREED

1. Clause 17 of the Charterparty be amended *ab initio* so as to provide for all and any disputes arising under the Charterparty to be determined by arbitration in Singapore under English law with each party appointing their own arbitrator, and those two arbitrators appointing a third arbitrator as umpire if they consider it necessary.

2. All and any current legal proceedings in Indonesia in respect of disputes under the Charterparty as may have been brought by Genuine Maritime Ltd., SA against Golden Ocean Group Limited and/or any other company in the same beneficial or associated ownership shall be discontinued forthwith on terms that there be no order as to costs. To the extent necessary, Golden Ocean Group Limited shall consent to such terms.

3. All and any current arbitration and court proceedings in London/England in respect of disputes under the Charterparty as may have been brought by Golden Ocean Group Limited against Genuine Maritime Ltd., SA shall be discontinued forthwith on terms that there be no order as to costs. To the extent necessary, Genuine Maritime Ltd., SA shall consent to such terms."

11. The Addendum was signed on behalf of Golden Ocean by Mr Flaaten, a senior chartering manager. His evidence is that he signed the Addendum relying on the draft working copy of the charter which had been provided by SSY and assumed that Genuine had been the counterparty to the fixture agreed on 18 March 2008 on that basis.

12. It is Golden Ocean's case that the original fixture was with HIT, and that clause 1 of the Addendum (but not the remainder) is of no effect as a matter of construction/implied condition and/or is void for mutual mistake. Accordingly it is Golden Ocean's case that it has never agreed to a fixture with Genuine and has never been party to an arbitration agreement agreeing to arbitrate any disputes in Singapore. Genuine's case is that the fixture was made originally between Golden Ocean and Genuine; and that in any event by the terms of the Addendum, which is valid and effective, Golden Ocean agreed to submit disputes to arbitration in Singapore, including disputes as to the identity of the disponent owner.

13. On 22 November 2010 Messrs Brookes and Co, solicitors appointed on behalf of Golden Ocean, commenced arbitration proceedings in London against HIT by inviting HIT to agree to the appointment of any of three named arbitrators as sole arbitrator. On 17 December 2010 Messrs Gurbani and Co, Singapore lawyers acting for both HIT and Genuine, denied that there was any charterparty to which HIT was party. The letter stated that Genuine had appointed a Mr Prakash as its arbitrator in Singapore and invited Golden Ocean to appoint its Singapore arbitrator.

14. On 7 February 2011 Golden Ocean issued a Claim Form in 2011 Folio 140 claiming a declaration that HIT was the disponent owner under the charterparty and seeking the appointment of one of the three nominees as the sole arbitrator in the London reference. In those proceedings, HIT made an application for a declaration that the English court did not have jurisdiction to hear the claim because there was no arbitration agreement between Golden Ocean and HIT. The proceedings were resolved by a consent order of Teare J of 22 June 2011 under which Mr Michael Baker-Harber was appointed as sole arbitrator in the reference, without prejudice to

HIT's right to contest the jurisdiction of the tribunal. It was agreed that the issue of whether or not there was a contract, and so an arbitration agreement, to which HIT was a party would be resolved by the tribunal as a preliminary issue.

15. On 20 January 2012 HST was placed into liquidation by an order of the High Court of Singapore. Mr Kardachi and Mr Borelli were appointed joint liquidators. Following an EGM of the shareholders of Genuine on 17 February 2012, Mr Kardachi and Mr Borelli were appointed as the directors of Genuine, and all other directors and officers of Genuine were removed from their posts. The background to the liquidation was that in November and December 2009, a large proportion of the assets of HST and its subsidiaries, including both vessels and shares in asset holding companies, were transferred from HST to another subsidiary of HIT in a purported restructuring exercise. The exercise was triggered by proceedings commenced by 4 subsidiaries of Empire Chemical Holdings Inc. against HST and HIT in mid 2009 to recover substantial sums relating to outstanding hire and damages for breach of contract in respect of a series of charterparties. The Empire companies alleged that the purported restructuring was simply an asset stripping exercise designed to avoid payment by HST and its subsidiaries of debts owed to the Empire group, which obtained arbitral awards totalling US$ 46 million against HST, together with summary judgment against HIT as guarantor of the relevant liabilities of HST. The court order winding up HST was made pursuant to an application of one of the Empire companies as part of its attempt to enforce payment of the sums awarded against HST.

16. Prior to the liquidation, the day to day management of Genuine had been conducted by HST. Since the liquidation and the appointment of Mr Kardachi and Mr Borelli as directors of Genuine (20 January 2012 and 17 February 2012 respectively), Genuine and HST have severed all operational and managerial links with HIT.

17. In the London arbitration before Mr Baker-Harber, Messrs Thomas Cooper, acting on behalf of HIT, presented written defence submissions on the jurisdiction issue alleging that HIT was not party to the charterparty and that Genuine was the disponent owner from the outset, alternatively by reason of the Addendum dated 8 March 2010. A hearing was fixed for 30 October 2012 at which HIT did not appear and were not represented. Genuine was not a party to the reference, and although invited to join the reference by Golden Ocean on 6 October 2012, did not do so. It could not do so without HIT's agreement, which was not provided.

18. With admirable celerity, Mr Baker-Harber published his award ("the Award") two days after the hearing, on 1 November 2012, holding that Golden Ocean had contracted with HIT, and that accordingly he had jurisdiction to determine the substantive merits of the dispute pursuant to the arbitration agreement contained in the charterparty. He awarded Golden Ocean its costs against HIT and reserved jurisdiction to deal with all outstanding matters in the reference.

19. On 16 January 2013 TKQP, Singapore lawyers acting on behalf of Genuine, sent a letter giving notice commencing arbitration in Singapore and nominating a Mr Shetty as its appointed arbitrator. That letter was sent by post to Golden Ocean in Bermuda and was not received until 1 February. In the meantime on 28 January 2013 Golden Ocean issued its Claim Form in these proceedings. On 8 February 2013 Golden Ocean issued its application notice for the relief sought on the present application, supported by the witness statement of Marianne Brookes indicating that the

application was intended to be made ex parte on notice. The application was originally listed to be heard by Burton J on 18 February 2013 but Genuine proposed that the hearing be vacated so that it could serve evidence in opposition to the application. By agreement the application was refixed for hearing on 26 April 2013. HIT was given notice of the new hearing date but served no evidence in opposition to the application and made no representations to me. The argument was not concluded on 26 April 2013 and was continued on 1 May 2013.

The relief sought in these proceedings

20. By its Claim Form issued on 28 January 2013, Golden Ocean seeks against HIT:

(1) A declaration that the charterparty is between Golden Ocean and HIT.

(2) Enforcement of the Award, including judgment for sums due to Golden Ocean under the Award, and the granting of such declarations and injunctions to enforce the Award as may be just. This would include a declaration in the terms of the Award that Golden Ocean contracted with HIT. This relief is sought by an action on the Award and/or pursuant to section 66 Arbitration Act 1996.

21. As against Genuine, Golden Ocean seeks:

(3) Enforcement of the Award, including granting of declarations and injunctions to enforce the Award. Golden Ocean contends that the Award implicitly declares that Genuine is not a party to the charterparty and that there is no arbitration agreement between Golden Ocean and Genuine, as well as explicitly declaring that the charterparty was between Golden Ocean and HIT; and that notwithstanding that Genuine was not formally a party to the reference or named in the Award, Genuine had a privity of interest with HIT in the arbitration and is therefore bound by the Award by an estoppel.

(4) A declaration that Genuine is not a party to the charterparty.

(5) A declaration that there is no arbitration agreement between Golden Ocean and Genuine.

(6) An injunction under Section 37 of the Senior Courts Act 1981 to restrain Genuine from pursuing the Singapore arbitration.

22. As to (1), (4) and (5), Golden Ocean contends that the court should itself address the issues of whether HIT or Genuine is a party to the charterparty, and whether there is an arbitration agreement between Golden Ocean and Genuine, on the basis of evidence to be adduced in these proceedings without reference to the decision in the Award.

The present application against HIT

23. Against HIT, the only relief sought on the present application is permission to serve out of the jurisdiction. The three requirements which have to be satisfied upon such an application were recently summarised by Lord Collins in ***Altimo Holdings and***

Investment Limited v Kyrgyz Mobil Tel Limited [2012] 1 WLR 1804 at [71] as follows:

> "71 On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*** [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i e a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e g ***Carvill America Inc v Camperdown UK Ltd*** [2005] 2 Lloyd's Rep 457, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see ***Canada Trust Co v Stolzenberg (No 2)*** [1998] 1 WLR 547, 555-557, per Waller LJ affirmed [2002] 1 AC 1; ***Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries)*** [2007] 1 WLR I2, paras 26-28. Third, the claimant must satisfy the court that in all the circumstances [England] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

24. As against HIT, these requirements are satisfied in relation to claim (2). Golden Ocean is entitled to enforce the Award, both by an action on the award and under section 66 of the Arbitration Act 1996. It has a good arguable case that its claims to do so come within the jurisdictional gateways provided for in CPR 6.36 and Practice Direction 6B Paragraph 3.1 (6) and/or 3.1 (10). England is clearly the appropriate forum. So far as concerns claim (1) for a declaration independently of the Award, I find that Golden Ocean has established a serious issue to be tried, for the reasons given in the Award and those I address below in relation to the Addendum; and that it has a good arguable case that that claim comes within the jurisdictional gateway provided for in Practice Direction 6B Paragraph 3.1 (6) That is not, however, an end to the question whether there should be permission to serve that claim against HIT out of the jurisdiction. It remains to be considered whether it is appropriate for the court to embark upon an investigation of the disputed facts when Golden Ocean can secure the same relief by the simpler expedient of an action on the Award and/or under s.66; that route will enable the same declaratory relief to be obtained from the court without a factual investigation into the merits of the issue. It would in my view require an exceptional case for the court to do so.

25. Mr Gee QC urged upon me that it was appropriate in the particular circumstances of this case because the prospects of enforcing the judgment against HIT in Indonesia would be improved by the judgment having been given on the merits by the English court, rather than by way of enforcement of the arbitrator's decision on the merits. The evidence to that effect is exiguous. Ms Brookes deposes at paragraph 59 of her third witness statement that she has been advised by Indonesian lawyers that a

judgment of an English court in favour of Golden Ocean "on the claims made in this action" would assist enforcement in Indonesia because it would be prima facie evidence against any defence HIT might seek to raise alleging that it is not a party to an arbitration agreement or charterparty with Golden Ocean and that Golden Ocean's counterparty is Genuine. She exhibits a report from the Indonesian lawyers supporting that evidence. The report does not for these purposes make any distinction between an English court judgment on the Award and an English court judgment on the merits of the dispute, but I am prepared to read it in the way for which Mr Gee QC contends because it seems to me more probable that if it is a question of the judgment having evidential value it is likely to be treated as of more evidential value if the merits have been addressed by the court itself. Nevertheless I would not regard this as a sufficient ground in itself justifying the court taking the exceptional course of engaging on a substantial day hearing on the merits. Permission should only be granted to pursue claim (1) against HIT if the Court will be conducting such hearing for the purposes of the claims against Genuine. I turn to address that question.

The present application against Genuine

26. Against Genuine, Golden Ocean seeks permission to serve out of the jurisdiction, and an interim anti-arbitration injunction to restrain pursuit of the Singapore arbitration, with a view to an expedited hearing of its claims for declarations and a permanent anti-arbitration injunction. Mr Gee QC estimated that a hearing would take 4-5 days and could take place in July or at the latest in October. He contends that Golden Ocean has a sufficiently arguable case for the declaratory relief and permanent injunctive relief on either or both grounds advanced (investigation of the facts or enforcement of the Award against Genuine as privy), that each basis falls within the jurisdictional gateways, and that England is clearly the appropriate forum for resolution of these claims.

27. Genuine contends that there is no serious issue to be tried that it was party to the Award by virtue of having a privity of interest, or that it is in any way bound by the Award, which operates solely as between Golden Ocean and HIT. Genuine contends that, in the absence of such privity, this court should not embark upon a determination of who was the contracting party to the charterparty, or whether the Singapore arbitration agreement in the Addendum is void or ineffective. Section 5 of Singapore's Arbitration Act applies the Uncitral Model Law on International Commercial Arbitration, Article 16 of which confers the power and jurisdiction of the arbitrators to determine their own jurisdiction, so called "Kompetenz-Kompetenz". In the alternative Genuine contends that Golden Ocean cannot show a serious issue to be tried that the Addendum is ineffective. Genuine advances no separate argument as to the jurisdictional gateways, but contends that in any event England is not the appropriate forum for resolution of any issues which fall to be decided between the parties. It contends that for similar reasons, there is no serious issue to be tried that Golden Ocean would be entitled to a final anti-arbitration injunction, and that in any event no interim anti-arbitration injunction should be granted.

The Issues

28. I find it convenient to address the issues in the following order:

(1) Is there a serious issue to be tried that Genuine had a privity of interest with HIT such that it is bound by the Award?

(2) Is there a serious issue to be tried that Golden Ocean is entitled to a declaration from the English court that Genuine was not a party to the charterparty, and that Golden Ocean is not party to an applicable agreement to submit the disputes to Singapore arbitration?

(3) If the answer to (1) or (2) is yes, is England clearly the appropriate forum for the resolution of such claims?

(4) If so, is there a serious issue to be tried that the court would grant a final anti-arbitration injunction?

(5) If so, should the court exercise its discretion to grant an interim anti-arbitration injunction?

Issue 1: Privity

29. An estoppel per rem judicatam applies to prevent relitigation of the same claim or issue by parties to earlier proceedings and those who are privy to them. As regards privity of interest, in ***Carl Zeiss Stiftung v Rayner & Keeler Ltd*** [1967] 1 AC 853 Lord Reid stated at 910G:

> "It seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter. …
>
> There does, however, seem to me to be a possible extension of the doctrine of privity as commonly understood. A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real Defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by relitigating the original question by means of the device of putting forward his servant."

30. In a passage approved by Lord Bingham in ***Johnson v Gore Wood & Co. (No.1)*** [2002] 2 AC 1 at p.32E-G, Megarry V-C said in ***Gleeson v J Wippell & Co*** [1977] 1 WLR 510 at 515:

> "Privity for this purpose is not established by having 'some interest in the outcome of litigation'...
>
> First, I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern...

> Second...a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation...But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party...
>
> Third...for privity with a party to the proceedings to take effect it must take effect whether that party wins or loses."

31. One important aspect which falls to be considered, as with any estoppel, is whether it would be unfair to hold the privy bound by the decision. It will normally be unfair to do so if the alleged privy has not had the opportunity to participate fully in the proceedings. As Sales J observed in ***Seven Arts Entertainment Ltd v Content Media Corporation Plc*** [2013] EWHC 588 (Ch) at [73]:

> "73. As stated above, the basic rule is that, before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it. This includes the opportunity to call any evidence he can to defend himself, to challenge any evidence called by the claimant and to make any submissions of law he thinks may assist his case. Although there are examples of cases in which a person may be found to be bound by the judgment of a court in litigation in relation to which he stood by without intervening, in my judgment those cases are illustrations of a very narrow exception to the general rule. The importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to that rule."

32. Most recently Arnold J summarised the relevant principles in ***Resolution Chemicals Ltd v H. Lundbeck AS*** [2013] EWHC 739 (Pat) (at [100]) in the following terms:

> "i) The test for privity of interest is whether, having due regard to the subject of the matter of the dispute, there is a sufficient degree of identification between the relevant persons to make it just to hold that the decision to which one is party should be binding in the proceedings to which the other is party: ***Gleeson v Wippell*** approved in ***Johnson v Gore Wood***.
>
> ii) Where someone who has knowledge of the earlier proceedings and a legal interest in their outcome sits backs and

> allows another person with the same legal interest in the outcome to fight his battle, he will be a privy with the other person: ***House of Spring Gardens***. But this is a narrow exception to the general rule that a person will not be bound by the outcome of proceedings to which he is not a party: ***Skyparks v Marks***, ***Powell v Wiltshire***, ***Seven Arts v Content.***
>
> iii) A direct commercial interest in the outcome of the litigation is insufficient to make someone a privy: ***Kirin-Amgen v Boehringer Mannheim***.
>
> iv) Whether members of the same group of companies are privies or not depends on the facts: ***Special Effects.***"

33. In the context of an arbitration award it will be rarer for a non-party to be subject to estoppel as a privy because by virtue of the private and confidential nature of arbitration, he will normally have no opportunity to intervene, nor access to the materials in the reference. In ***Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada*** [2005] 1 Lloyd's Rep 606 Mance LJ emphasised these aspects of arbitration at [68]:

> "Arbitration is in contrast [to litigation] a consensual, private affair between the particular parties to a particular arbitration agreement. The resulting inability to enforce the solutions of joinder of parties or proceedings in arbitration, or to try connected arbitrations together other than by consent, is well-recognised - though the popularity of arbitration may indicate that this inability is not often inconvenient or that perceived advantages of arbitration, including confidentiality and privacy are seen as outweighing any inconvenience. Different arbitrations on closely inter-linked issues may as a result lead to different results, even where, as in the present case, the evidence before one tribunal is very largely the same as that before the other. The arbitrators in each arbitration are appointed to decide the disputes in that arbitration between the particular parties to that arbitration. The privacy and confidentiality attaching to arbitration underline this; and, even if they do not lead to non- parties remaining ignorant of an earlier arbitration award, they are calculated to lead to difficulties in obtaining access, and about the scope of any access, to material relating to that award."

34. HIT consented to the order of Teare J in 2011 Folio 140 on 17 June 2011 by which the issue was agreed to be referred to the determination of Mr Baker-Harber. Mr Gee QC argued that at that time HIT and Genuine had a community of interest in the dispute being resolved in favour of HIT because they were group companies under common management and control; and that therefore Genuine must be taken to have decided to sit back and let HIT fight its battle as to who was the single counterparty to the charter. That does not follow merely from the fact that they were group companies. The two companies were conducting separate business under separate

corporate identities. HIT was managed from Indonesia; Genuine was managed by HST in Singapore. The constitution of their boards of directors was different, although there was some overlap. The mere fact that HIT was the ultimate parent of Genuine does not mean that they had an identity of interest in which of them held the benefit of a claim against Golden Ocean (assuming a valid claim for repayment of hire), or owed a liability towards Golden Ocean (assuming a valid claim for repayment of hire). However in December 2010 Gurbani & Co seemed to be acting for both HIT and Genuine in denying that HIT was a party and asserting that Genuine was, and I would regard that as sufficient to give rise to a triable issue that they had an identity of interest at that stage and when the consent order was made six months later. Nevertheless Genuine was not party to the proceedings and did not consent to the order. It was not asked to participate in the process or to agree to abide by the outcome. Golden Ocean did not at that stage ask the court to decide the issue on a tripartite basis as it now does, nor invite consent to a tripartite London arbitration. Genuine was not sitting by and letting its rights be determined in the London arbitration because it had appointed Mr Prakash as its Singapore arbitrator to determine the dispute and therefore to resolve the jurisdiction issue. Genuine could not reasonably have been taken as giving up its contention that the issue should be resolved in Singapore arbitration.

35. In any event, by the time Mr Baker-Harber came to consider the written submissions before him, to hold an oral hearing and to proceed to make his Award, the liquidators of HST had been appointed and the management and operation of Genuine had become wholly independent from that of HIT. Their interests were adverse or at least potentially so: insofar as there is a valid claim for early redelivery of the Vessel, each had an interest in claiming to be a party to the charterparty to the exclusion of the other; to the extent that there is a valid claim for repayment of hire, the converse was true. Nor was Genuine reasonably able to participate in the arbitration so as to protect its interest. The invitation by Golden Ocean to join the reference came only on 9 October 2012, some three weeks before the hearing, after previous complaints that Genuine had no locus standi to communicate with the arbitrator. Even had it been reasonable to expect Genuine to try to join the reference at that late stage, which in my view it was not, Genuine could not do so without the agreement of HIT, which was not given. The thrust of Mr Gee QC's argument was that this later period was irrelevant and that the material time was when consent was given to the order of Teare J appointing Mr Baker-Harber. I disagree. Genuine was not at that stage sitting back and letting HIT fight its battle for it; and even if it had been, it was not doing so when battle was joined in the arbitration which is the material time for these purposes. It would not be fair to hold Genuine bound by the result of an arbitration in which it had no reasonable opportunity to participate.

36. Accordingly in my judgment Golden Ocean's argument that Genuine is privy to and bound by the Award has no real prospect of success.

Issue 2: Is there a serious issue to be tried that Golden Ocean is entitled to a declaration from the English court that Genuine was not a party to the charterparty, and that Golden Ocean is not party to an applicable agreement to submit the disputes to Singapore arbitration?

37. Issue 2 in fact raises two questions. The first is concerned with the substantive dispute whether Genuine was party to the charterparty and whether Golden Ocean is

party to an applicable agreement to submit the disputes to Singapore arbitration. That is the issue raised by the relief sought by Golden Ocean against Genuine in the action, and in respect of which it seeks permission to serve out. It must show a serious issue to be tried. The second question is whether the English court is the appropriate tribunal to determine the merits of that substantive dispute or whether it should be determined in the Singapore arbitration. The latter, although involving similar considerations to those which arise under Issue 3, arises under Issue 2 and is a threshold question. Unless the court is persuaded that it is the right tribunal to address the substantive issue, it is irrelevant whether it considers that Golden Ocean is arguably right on the issue. Although it is a threshold question, I nevertheless find it convenient to address the substantive dispute first.

The effect of the Addendum

38. It is common ground that on the evidence presently before the court there is an arguable case that HIT, not Genuine, was the disponent owner with whom Golden Ocean originally contracted by the fixture of 28 March 2008. The Addendum falls to be considered, therefore, against the assumed background that the true position was contrary to that set out in Recital 1, which recorded Genuine as being party to the charterparty. The assumed background for present purposes is that, as Mr Baker-Harber found, HIT was the disponent owner under the charterparty when it was entered into, and throughout its performance. It is also important to keep in mind that HIT was not party to the Addendum and is unaffected by its provisions. The Addendum cannot operate as a novation, and does not release Golden Ocean from any obligations towards HIT under the charterparty. If Genuine is right that its effect was to make Genuine a contractual counterparty on the terms of the charterparty, the consequence is that Golden Ocean assumed the obligations imposed by the charterparty to two different disponent owners without performance against one being treated as performance against the other. Golden Ocean would have become liable to Genuine for all the hire due under the charterparty notwithstanding that it had been paid to HIT. Golden Ocean would be assuming liability to Genuine for any breaches of obligations under the charter without being released from identical liability owed also to HIT. The effect of the Addendum would be that if, as Genuine allege, there is a valid early redelivery claim against Golden Ocean for some $6m, that is a liability which Golden Ocean agreed to assume twice over by entering into the Addendum, once to HIT and again to Genuine.

39. Mr Gee QC advanced two arguments why the Addendum did not change the contractual counterparties and why clause 1 was ineffective as an agreement to submit that question to arbitration in Singapore. They were in truth closely related. The first was that Clause 1 was ineffective as a matter of construction of the Addendum because it was an implied condition of Clause 1 that the charterparty had been entered into between Golden Ocean and Genuine; the condition was not fulfilled because it was HIT which was party to the existing charterparty and arbitration clause. The second was that clause 1 was void for mistake, both parties mistakenly believing that the charterparty had been entered into between Golden Ocean and Genuine.

40. In support of these arguments Mr Gee QC drew attention to the terms of Recital 1 and Recital 4 which expressly provide that the existing charterparty is with Genuine and that the parties were purporting to amend an arbitration agreement to which they were both already party. He submitted that the language of Clause 1, being to amend

clause 17 of the charterparty "ab initio", can only be given meaning if Genuine and Golden Ocean were parties to clause 17 from the beginning. A and B cannot amend a contract between B and C. A similar argument was addressed to the use of the expression "disputes arising under the Charterparty". He relied upon ***Associated Japanese Bank (International) Ltd v Credit du Nord*** [1989] 1 WLR 255 in which the plaintiff entered into an agreement with a rogue who purported to sell and lease back certain machines and the defendant agreed with the plaintiff to guarantee the rogue's payments under the lease-back arrangements. The machines did not in fact exist. Steyn J held at pp. 263-4 that it was a condition precedent of the guarantee that the machines existed, both as a matter of construction and as a matter of necessary implication. The machines did not exist and the contract was therefore ineffective. He held in the alternative that the contract was void for common mistake by reference to the principles stated by the House of Lords in ***Bell v Lever Bros*** [1932] AC 161. At p.269 he said:

> "…For both parties the guarantee of obligations under a lease with non-existent machines was essentially different from a guarantee of a lease with four machines which both parties at the time of the contract believed to exist. The guarantee is an accessory contract. The non-existence of the subject matter of the principal contract is therefore of fundamental importance. Indeed the analogy of the classic res extincta cases, so much discussed in the authorities, is fairly close. In my judgment the stringent test of common law mistake is satisfied: the guarantee is void ab initio."

41. Mr Gee QC submitted that this reasoning and the approach to non-existent subject matter taken by the Court of Appeal in ***The Great Peace*** [2003] QB 679 (in which ***Associated Japanese Bank (International) Ltd v Credit du Nord*** was cited with approval) and the House of Lords in ***Bell v Lever Bros***, is applicable to the present case. Clause 1 of the Addendum is a contract to amend an accessory contract, viz the arbitration agreement in the charter party. If there was no charterparty or existing arbitration agreement between Golden Ocean and Genuine, but at the time of the Addendum both parties mistakenly believed that such agreements were in existence, the contract to amend the arbitration agreement was a contract concluded under a fundamental mistake as to its subject matter, which did not exist.

42. Mr Gee QC further relied upon the decision of the Court of Appeal in ***Graves v Graves*** [2007] EWCA Civ 660. In that case a husband agreed to let a house which he owned to his former wife. Both knew that she could not afford to pay the rent unless she were entitled to housing benefit. Inquiries of the local District Council suggested that housing benefit was payable and the tenancy was concluded on that common assumption. The assumption proved mistaken because the Council had made a mistake of law: the wife was not entitled to housing benefit. When the husband brought proceedings for possession for non payment of rent, the judge held that the tenancy was void for mistake. In giving the judgment of the Court, Thomas LJ said:

> "26. In approaching the arguments addressed to us, we have considered the analysis of the law set out in ***Bell v Lever***

> ***Brothers*** [1932] AC 161, ***National Carriers Ltd v Panalpina (Northern) Ltd*** [1981] AC 675 and ***Great Peace***.
>
> 27. It is clear from these decisions that the first task of a court is to examine the nature of the agreement made by the parties and in particular the allocation of risk. The judgment of Steyn J in ***Associated Japanese Bank (International) Ltd v Crédit du Nord*** [1989] 1 WLR 255 and of Hoffman LJ in ***William Sindall plc v Cambridgeshire County Council*** [1994] 1 WLR 1016 (referred to at paragraphs 80 and 81 of ***Great Peace***) are illustrations of this approach which is also set out in Chitty on Contracts (29th edition) at paragraphs 5-015 and 5-041. As Steyn J said in ***Associated Japanese Bank*** :
>
> "Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.""

43. Having referred to the celebrated passage in the speech of Lord Atkin in ***Bell v Lever Brothers*** at pp 225-6 where Lord Atkin stated that the contract would be void ab initio for mistake where the common assumption was as to "a foundation essential to its [i.e. the contract's] existence", Thomas LJ concluded that, following ***Associated Japanese Bank,*** before considering the doctrine of mistake it was appropriate first to consider whether the tenancy contained an implied condition that it was to end if housing benefit was not payable. That question was answered in the affirmative which made it unnecessary to consider the application of the doctrine of mistake.

44. Mr Craig submitted that the relevant principles were those set out by Lord Phillips MR in ***The Great Peace*** at [76]:

> "76. If one applies the passage from the judgment of Lord Alverstone CJ in ***Blakeley v Muller & Co*** 19 TLR 186, which we quoted above to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

45. Mr Craig submitted that Golden Ocean failed to fulfil one or more of three of these criteria. First, he argued, each party warranted to the other in the recitals that the existing charterparty was with Genuine, so that each accepted the contractual risk that that should turn out to be erroneous. In the absence of full factual matrix evidence, I would be reluctant to accept that the recitals alone must be so construed. It would be a commercially surprising result for either party to be agreeing to bind themselves for a second time to perform the charterparty terms to someone who might not be their existing counterparty without a release from the existing counterparty. The recitals are more naturally read as a statement of the understanding on which the agreement was entered into than a mutual warranty of allocation of risk. Mr Craig did not argue for a contractual estoppel. Secondly, Mr Craig contended that performance of the agreement was not impossible because the parties could arbitrate their disputes in Singapore. But as ***Graves v Graves*** illustrates, that is not a bar to the ineffectiveness of the apparent agreement; and it ignores the linguistic points made by Mr Gee QC which make it difficult to treat Clause 1 as being possible of performance. How, one might ask, can Clause 1 be effective to refer all disputes arising under the charterparty to arbitration in Singapore when there are disputes between Golden Ocean and HIT who are not parties to the Addendum? Thirdly, Mr Craig submitted that the fact that Genuine was not the existing party to the charterparty was not a vital aspect of the consideration to be provided for the purposes of the contract. But the contrary seems to me to be at the lowest arguable, given the language of the Addendum and the commercial consequences of contracting with two disponent owners with exposure to double liability. Mr Craig further submitted that there was no room for the application of any implied condition argument in the light of Lord Phillips' statement at [81] of ***The Great Peace*** that the doctrine of mistake can not satisfactorily be explained by an implied term. But, as ***Graves v Graves*** and ***Associated Japanese Bank*** illustrate, an implied condition may arise independently of the operation of the doctrine of mistake.

46. It is not possible on the current application to reach concluded views on these issues which will be coloured by a fuller understanding of the background to the Addendum. I am however satisfied that the arguments advanced by Mr Gee QC have a real prospect of success. I am satisfied, therefore, that if the English court is the right tribunal to embark upon the questions, Golden Ocean has shown a serious issue to be tried that it is entitled to the declaratory relief sought in the action. I return to the threshold question whether the issue is one for the court or for a Singapore arbitral tribunal.

The Threshold question

47. It would not be appropriate for the court to grant permission to serve out of the jurisdiction if thereafter the court would grant Genuine a stay of proceedings in favour of arbitration. The legal framework in which such a stay application would be considered is as follows.

48. Section 9 of the Arbitration Act 1996 provides:

> "9(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.
>
> …..
>
> (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. ”

49. In ***JSC BTA Bank v Ablyazov*** [2011] 2 Lloyd’s Rep 129 Christopher Clarke J identified the dichotomy between the ingredients of section 9(1) and those of section 9(4) in the following terms:

> “The structure of the Act
>
> 31. The Act requires the court first to examine whether or not there is a written arbitration agreement (defined as an "agreement to submit to arbitration present or future disputes (whether they are contractual or not)"), which covers the subject matter of the action. If there is such an agreement a stay is mandatory unless the court is "satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed". The onus of satisfying the court lies on the party resisting a stay.
>
> 32. In ***Albon*** Lightman J observed that there was a distinction to be drawn, in this field, between whether an arbitration agreement had been "constituted", ie brought into existence, and whether it "exists" (which may mean that it has been brought into existence or that it still subsists) and as to its "validity", ie whether it is legally binding. The court must determine whether an agreement was concluded before considering the application of section 9(4).
>
> 33. It is apparent from the dichotomy inherent in sections 9(1) and (4) that a party seeking a stay may establish that an arbitration agreement has been concluded which the other party says is null and void, inoperative or incapable of being performed. There are a number of grounds upon which one or more of these matters might be established, eg that the agreement was induced by fraud, misrepresentation or mistake or by bribery or other vitiating cause, or that it was illegal or cannot legally be performed. It is inconsistent with the scheme of the Act that the party who proves a written arbitration agreement and seeks a stay must establish that the agreement is not null and void or inoperative or incapable of being performed. The onus in that respect is on the party resisting the stay. If the applicant shows that it is arguable that the arbitration agreement is not "null and void etc", a stay will be granted.

34. In ***Albon*** Lightman J observed:

"In this context 'null and void' means 'devoid of legal effect'. This is made clear by the decision in 1983 of the US 3rd Circuit Court of Appeals in ***Rhone Mediterranee v Achille Lauro*** 712 F.2d 50. The court in that case had to determine the construction of identical wording in article 11.3 of the 1959 New York Convention. On this issue the court said:

'We conclude that the meaning of Art 11 section 3 which is most consistent with the overall purpose of the Convention is that an agreement to arbitrate is 'null and void' only (a) where it is subject to an internationally recognised defence such as duress, mistake, fraud or waiver or (b) when it contravenes fundamental policies of the forum State. The 'null and void' language must be read narrowly for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.' (Pages 3 to 4.)

Likewise in this context for an arbitration agreement to be 'inoperative' it must have been concluded but for some legal reason have ceased to have legal effect; eg by reason of acceptance of a repudiation as in ***Downing v Al Tameer Establishment*** [2002] BLR 323 (`Downing') at paras 26 to 35."

35. The obligation on the party seeking a stay is to establish an agreement in writing, which is defined by the Act in the following terms:

"5 Agreements to be in writing

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.

(2) There is an agreement in writing:

(a) if the agreement is made in writing (whether or not it is signed by the parties);

(b) if the agreement is made by exchange of communications in writing; or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

> (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
>
> (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
>
> (6) References in this Part to anything being written or in writing include its being recorded by any means."
>
> 36. This wide definition allows, in appropriate cases, considerable scope for argument as to whether an agreement has been concluded. There may be dispute as to whether, in English law terms, the written communications establish the making of an offer which was accepted; or whether there was an agreement otherwise than in writing which is evidenced in writing by an accurate record made with the authority of the parties; or whether there has been an oral agreement by reference to written terms (eg an oral agreement on LMAA terms); or whether an alleged agreement which was recorded on tape amounted to one.
>
> 37. There may, also, be a dispute as to whether or not an apparent written agreement is the act of the party resisting a stay, as where there is a plea of forgery or *non est factum* or the equivalent, or because the agreement is said to have been made by someone who had no authority to make it so that no arbitration agreement came into existence."

50. Apart from the jurisdiction under section 9, the court has an inherent jurisdiction to grant a stay of court proceedings, which may be exercised where there is a dispute as to whether there is an applicable arbitration agreement: ***Al-Naimi v Islamic Press Agency Inc*** [2000] 1 Lloyd's Rep 522.

51. Mr Craig submits that the court would grant a stay under section 9 because the Addendum was a clear agreement which brings Genuine within section 9, and in particular fulfils the requirement of section 9(1). He contends that all that needs to be shown to require a stay under section 9 is an arguable case that section 9(4) is not fulfilled, and that there is such an arguable case about the effect of the Addendum. Alternatively he submits that if Genuine cannot bring itself within section 9(1), the court can and should grant a stay under its inherent jurisdiction.

52. Mr Gee QC submits that if section 9 were invoked, the court would order the trial of an issue in order to enable it to determine the dispute, because it is a dispute which affects whether Genuine can bring itself within section 9(1) and/or because it is not sufficient for the purposes of section 9(4) merely to show an arguable case that the arbitration agreement is effective and applicable. He further submits that the court

will only grant a stay under its inherent jurisdiction in favour of the Kompetenz-Kompetenz of an arbitral tribunal in exceptional circumstances, which are not present in this case; on the contrary, he submits, the discretionary factors point away from such a stay.

53. A helpful recent summary of relevant authority is to be found in the judgment of Floyd J in ***JSC Aeroflot Russian Airlines v Berezovsky*** [2013] 1 Lloyd's Rep 345:

> "67. As Lightman J made clear in ***Albon v Naza Trading Sdn Bhd (No 3)*** [2007] 2 Lloyd's Rep 1, section 9(1) requires a concluded arbitration agreement before the court can order a stay, and not merely an arguable case that there was such an agreement. Mr Tregear submitted that the same standard did not apply to all the requirements of section 9: in particular it did not apply to the requirements of section 9(4). In particular he submitted that it was enough if the applicants could show an arguable case that the agreement was not null and void or inoperative.
>
> 68. Mr Tregear's submission gains support from the judgment of Potter LJ in ***Downing v Al Tameer Establishment*** [2002] BLR 323. In that case he said at that:
>
> "The burden of proving that any of the grounds in s 9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted: ***Hume v AA Mutual International Insurance Co Ltd*** *[1996]* LRLR 19."
>
> 69. The question at issue in Downing was whether the claimant had accepted a repudiation of the arbitration agreement. The Court of Appeal, disagreeing with the first instance judge, came to the very clear conclusion that he had repudiated the agreement: see paras 38 and 39. It follows that the dictum of Potter LJ was not necessary for the decision which he reached.
>
> 70. Neither side was able to point me to anything in ***Hume v AA Mutual International Insurance Co Ltd,*** the case cited by Potter LJ in ***Downing***, which supported the proposition that an arguable case of validity under section 9(4) was enough. Moreover Mr Tregear did not put forward any reason why the court should adopt such a radically different approach under the two limbs of the section.
>
> 71. In ***Albon***, Lightman J was faced with an argument which sought to build on Potter LJ's dictum, saying that it was sufficient if the defendant could raise an arguable case as to the existence of the agreement. Lightman J rejected that argument, and expressly left open the question of whether Potter LJ's dictum in ***Downing*** as to the sufficiency of an arguable case under section 9(4) was supported by the authority cited.

72. In ***A v B*** [2007] 1 Lloyd's Rep 237, Colman J said this about the approach to section 9(4) at para 137:

> "The structure of section 9 of the 1996 Act leaves no doubt that once the existence of an arbitration agreement has been established by the applicant, a stay will be granted unless one of the section 9(4) matters is established. The respondent to the application must therefore make good the existence of one of those matters. If the court is unable to determine whether it is so satisfied on the witness statements before it, consideration has to be given to whether to order a trial of the issue or whether a stay should be granted and the question of substantive jurisdiction under section 9(4) left to the arbitrators. Whether the latter course is adopted may in many cases depend heavily on the extent to which the resolution of that issue will involve findings of fact which impact on substantive rights and obligations of the parties which are already in issue and whether in general the trial can be confined to a relatively circumscribed area of investigation or is likely to extend widely over the substantive matters in dispute between the parties. If the latter is the case the appropriate tribunal to resolve the jurisdictional issues is more likely to be the arbitration tribunal, provided it has Kompetenz-Kompetenz."

73. In my judgment the correct approach is that the burden of establishing the matters identified in section 9(4) rests on the party asserting them, namely the claimant. Beyond that, I am prepared to accept that the use of the word "satisfied" in subsection (4) is an indication that the court must come to a clear conclusion that the agreement is null and void, inoperative or incapable of performance. However I am unable to go as far as accepting that the existence of a mere arguable case to the contrary would be sufficient for the court to give effect to the arbitration agreement.

74. CPR 62.8(3) provides that:

> "Where a question arises as to whether:
>
> (a) an arbitration agreement has been concluded; or
>
> (b) the dispute which is the subject matter of the proceedings falls within the terms of such an agreement, the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision."

75. Apart from the two ways forward indicated under that rule (deciding the question or giving directions for trial) the court may decide to stay the court proceedings to allow the arbitrator

to rule on his own jurisdiction: see ***Al-Naimi v Islamic Press Agency Inc*** [2000] 1 Lloyd's Rep 522. Such a stay is not ordered under section 9 of the Act, because that section requires, as a pre-condition of the jurisdiction to grant the statutory stay, a conclusion that an arbitration agreement has been made. Instead the court exercises its inherent jurisdiction: ***Al-Naimi*** at page 525, col 2. In ***Al-Naimi*** Waller LJ endorsed a passage from the judgment of HHJ Humphrey Lloyd QC in ***Birse Construction Ltd v St David Ltd*** [1999] BLR 194 in which he said that the course of leaving the issue of whether there is an arbitration agreement to the arbitrator was a course to be followed only where the court is "virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement". However, in the course of his own judgment, Waller LJ suggested that "a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters, but can see that good sense and litigation management make it desirable for the arbitrator to consider the whole matter first". Waller LJ gives the example of a case where a trial was necessary to decide the scope of the arbitration clause, where the court thought it likely that it would turn out that the matters were within the clause, that there were matters which would fall within the clause anyway and it would only be a short step to deciding the real issues. In short he was suggesting a case where there was little risk that the matter would have to return to the court following a decision by the arbitrator. Thus, Lightman J said in ***Albon***:

> "The court may in exercise of its inherent jurisdiction in its discretion order such a stay both where the issue is as to the conclusion or as to the scope of the arbitration agreement. But the court should only exercise its inherent jurisdiction to order such a stay and decline to decide the issue of the conclusion of the arbitration agreement or of the scope of the arbitration agreement in an exceptional case. The inherent jurisdiction should be exercised with particular caution where the issue is as to the conclusion of the arbitration agreement. The court may very exceptionally order such a stay eg if virtually certain that the arbitration agreement was concluded. Exceptional but less compelling circumstances (eg overwhelming considerations of convenience and cost) may justify such a stay where the issue of the scope of the arbitration agreement is in issue eg when the issue is closely bound up with the issues in the arbitration: see ***Al-Naimi*** at page 525 and ***El Nasharty v J Sainsbury plc*** [2004] 1 Lloyd's Rep 309 at paras 28 to 29."

76. Where the court takes the course of deciding the matter, the Court of Appeal, again in the ***Al-Naimi*** case, indicated that the court should direct a trial where there are triable issues on the

> facts material to the jurisdiction question on which there were requests for cross-examination. However this principle may give way to the agreement of the parties that the matter should be decided on witness statements alone. Waller LJ expressly stated that there may be situations where, even with the parties' agreement, the court "may simply feel it cannot resolve the issue without hearing the witnesses".”

54. The issue whether it is sufficient for the applicant to show merely an arguable case that the arbitration agreement does not fulfil s. 9(4) as being “null and void etc” was also considered by Christopher Clarke J in ***JSC BTA Bank v Ablyazov*** at [33], [46], [49], [50]. Christopher Clarke J recognised that the court might direct a trial of the issue as to whether or not the apparent agreement was “null and void etc”, but that it would be unlikely to do so unless such a trial could be confined to a relatively circumscribed area of investigation. That was not a realistic option in that case because the resolution of the issue would have depended upon the resolution of the substantive dispute between the parties which was complex. Christopher Clarke J held that the respondent had failed to establish that the arbitration agreement, which fell within s.9 (1), was “null & void etc” within s. 9(4) and granted the stay. In doing so he accepted the submission that in those circumstances it was sufficient for the applicant to show an arguable case as to the validity of the arbitration agreement; but he did so because if the Court could not resolve the issue, the existence of such an arguable case prevented the respondent from discharging the burden of proof which lay upon him under s. 9(4) of enabling the Court to be “satisfied” that the agreement is “null and void etc”: see [31], [33], [46]. This is consistent with the analysis of Floyd J in ***JSC Aeroflot Russian Airlines v Berezovsky***. A merely arguable case will not be sufficient if the Court can resolve the issue itself either on the application or by directing an issue to be tried. It will however be sufficient if the Court cannot resolve the issue on the application and does not direct a trial of the issue, because it is simply the other side of the coin to the respondent being unable to discharge the burden of proof which lies upon him under s. 9(4).

55. I therefore reject Mr Craig’s argument that it is sufficient on this application for him to show merely that it is arguable that the Singapore arbitration agreement is valid and effective. That begs the logically anterior question which is whether the Court should decide that issue itself or leave it to be decided by the Singapore arbitral tribunal.

56. A similar point arose in ***Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT*** [2010] EWHC 2567 (Comm), in which there was a “battle of forms” dispute as to whose standard conditions applied to the manufacture and sale of engineering equipment by Claxton to TXM. TXM’s form contained a Hungarian arbitration clause; Claxton’s form contained an exclusive English jurisdiction clause. TXM sought a stay under section 9 on the grounds that the Hungarian arbitration clause in its standard terms and conditions was applicable to the disputes. At paragraph 11(i) Gloster J identified the first issue as being whether the court, or an as yet unconstituted Hungarian arbitral tribunal, should decide the threshold question whether an arbitration agreement was reached between the parties. The parties agreed that the issue was capable of being resolved by the court upon the written material before it on the application, although not that Gloster J should do so: TXM contended that the issue should be referred to the Hungarian arbitral tribunal. At paragraph 16

Gloster J identified the factors relevant to this issue as including the circumstances of the application, the clarity of the evidence as to whether an arbitration agreement existed in relation to the particular dispute, the interest of the parties, the avoidance of unnecessary cost and expense, whether it would be more sensible to leave the matter to the arbitrators to decide, and whether an arbitration was going to take place in any event. Her decision was that the court should resolve the issue, and she did so in favour of Claxton. In granting permission to appeal from her decision ([2011] EWCA Civ 410) Rix LJ said:

> "3. In my judgment there should be permission to appeal ……. ……in essence the underlying ground is opposition to Gloster J's decision that she was entitled, by reason of what she considered to be a binding decision of this court in ***Ahmad Al-Naimi -v- Islamic Press Agency*** [2000] 1 Lloyd's Rep 522, to exercise her jurisdiction to decide whether or not there was a binding arbitration agreement between the parties rather than to leave that question, provided there was a good arguable case for such an arbitration agreement, to the Kompetenz Kompetenz jurisdiction of the arbitrators concerned.
>
> 4. In my judgment there is an arguable issue suitable for appeal as to the effect of the ***Ahmad Al-Naimi*** judgment in circumstances where Waller LJ appears to have left it open at 525 in the right hand column as to whether section 9 of the Arbitration Act 1996 does require a decision on the existence of an arbitration clause, and in circumstances where the critical point in that case (see the turn of the page 525/526) is that the parties there had agreed that the issue whether the arbitration clause applied should be determined by the English court. In the present case there was no such common ground. TXM submitted that it was contrary to the philosophy of arbitration pursuant to both the New York Convention and the Arbitration Act 1996 and to the importance of Kompetenz Kompetenz jurisdiction in the role of arbitrators that this court should go beyond establishing whether there was a good arguable case for an arbitration agreement."

57. It appears that an appeal was not pursued by TXM. Despite the view of Rix LJ that the contrary is arguable, I would for my part treat the decision of Gloster J on this point as orthodox and correct. The battle of forms dispute raised a real issue whether Claxton had concluded an agreement in writing to submit any disputes to determination by an arbitral tribunal. No question of relief under section 9 could arise without the Court resolving that question because TXM could not otherwise bring itself within s 9(1). A stay in favour of the Hungarian arbitral tribunal could only be granted as a matter of discretion under the inherent jurisdiction of the court. The exercise of the discretion to decline to defer the decision to a Hungarian arbitral tribunal was in my view amply justified by fact that the issue was capable of being resolved on the documents and that, if resolved in Claxton's favour, Claxton was entitled to the benefit of an exclusive English jurisdiction clause, quite apart from issues of cost and convenience.

58. I would not regard it as contrary to the philosophy of arbitration pursuant to either the New York Convention or the Arbitration Act 1996, or to the importance of Kompetenz-Kompetenz jurisdiction in the role of arbitrators, that the court should go beyond establishing whether there is a good arguable case for an applicable arbitration agreement. In this context it is important to distinguish between a dispute as to the validity of the arbitration agreement and a dispute as to the validity of the matrix contract in which it is contained. An arbitration agreement which forms part of another contract is, under English law, to be treated as a distinct agreement from that other contract: see section 7 Arbitration Act 1996 and ***Privalov & others v Fiona Trust & others*** [2007] UKHL 40. The principle that the arbitration clause within the body of a larger contract forms a separate and distinct agreement is "part of the very alphabet of arbitration law": ***Lesotho Highlands Development Authority v Impregilo Spa*** [2006] 1 AC 221 at [21] per Lord Steyn. Disputes which engage s. 9(1) or s. 9(4) must relate to the distinct arbitration agreement, not merely the matrix contract in which it is contained. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration: ***Privalov v Fiona Trust*** at [18], although it is a matter of construction of the arbitration agreement in each case. Provided that this distinction is kept in mind, and that the dispute is as to the validity of the distinct arbitration agreement, there can be no presumption in favour of the Kompetenz-Kompetenz of a tribunal on which the parties may not have agreed to confer jurisdiction. Under the Convention, the validity and applicability of the alleged arbitration agreement falls to be considered afresh by the enforcing Court, as reflected in s. 103(2) Arbitration Act 1996,. So too does the question arise afresh when the English court is exercising its supervisory jurisdiction: s. 67 Arbitration Act 1996. A Kompetenz-Kompetenz decision of the tribunal is not final or binding on the parties, and it is not enough to make it so that one party establishes merely an arguable case that the other party agreed to confer such Kompetenz-Kompetenz jurisdiction on the tribunal. See ***Dallah Real Estate v Ministry of Religious Affairs*** [2011] 1 AC 763 and ***AES Ust-Kamenogorosk Hydropower Plant LLP v Ust-Kamenogorosk Hydropower Plant JSC*** [2012] 1 WLR 920. A party who has only arguably agreed to submit his disputes to arbitration, but not in fact done so, cannot be said to be cutting across the philosophy of the Act or the Convention by asking the court to decide that he has not done so.

59. I would venture to summarise the principles applicable to a situation where C brings proceedings against D in relation to matters which D claims, but C disputes, are governed by an arbitration agreement which confers Kompetenz-Kompetenz on the arbitral tribunal as follows:

(1) The court's jurisdiction to grant a stay may arise under section 9 Arbitration Act 1996 or under its inherent jurisdiction.

(2) Section 9(1) permits the grant of a stay under the section only if D is party to a written arbitration agreement which has agreed to refer to arbitration the matters in respect of which C has brought the proceedings. Section 9(1) is concerned with whether an agreement to arbitrate was concluded. It is not concerned with whether such agreement is valid or enforceable or continues in existence, which is the subject matter of s. 9(4). It is also concerned with whether the scope of the agreement to arbitrate extends to the matters in issue

between the parties in their substantive dispute. To bring himself within the scope of section 9, D must establish that such an agreement was concluded, and that its terms apply to the underlying dispute. Examples of disputes which will engage this subsection are where C alleges that the written communications do not establish the making of an offer which was accepted; or that any agreement was otherwise than in writing; or that the agreement was forged or made by someone who had no authority; or that the agreement does not cover the subject matter of the underlying dispute.

(3) If s. 9(1) is fulfilled, s. 9(4) requires the court to grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of having effect. Examples of disputes which will engage this subsection are where C alleges that the arbitration agreement is vitiated by fraud or misrepresentation, or that the agreement is void for illegality, mistake or duress.

(4) Disputes which engage s. 9(1) or s. 9(4) must relate to the distinct arbitration agreement, not merely the matrix contract in which it is contained. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration, although it will be a question of construction of the arbitration agreement in each case.

(5) It is for D to satisfy the court that he comes within s. 9(1) before the court can grant relief under that section. It is not enough for him to show merely an arguable case that he is party to a concluded arbitration agreement which has agreed to refer to arbitration the matters in respect of which C has brought the proceedings. Unless the court is satisfied that that is so, there is no jurisdiction under the section to stay proceedings. The court must therefore determine the dispute if it affects the question whether D comes within s. 9(1). If it cannot do so on the written evidence at the hearing of the application, it must direct a trial of that issue before granting a stay under s. 9. It may, however, decline to direct a trial of the issue and grant a stay under its inherent jurisdiction without resolving the issue.

(6) If D has brought himself within s. 9(1), it is for C to satisfy the court that the arbitration agreement is null and void, inoperative or incapable of having effect under s. 9(4). If it is not clear on the evidence before the court whether the agreement is “null and void etc”, the court may order the trial of that issue, but is not bound to do so. If it declines to do so, it will be sufficient for D to show an arguable case that the arbitration agreement is valid and effective because in such circumstances C will have failed to discharge the burden imposed on him by s. 9(4) of satisfying the court that the agreement by which he agreed to refer the matters in dispute is “null and void etc”.

(7) In deciding whether to order the trial of the arbitrability issue under s. 9(1) or s. 9(4), or whether to grant a stay under the inherent jurisdiction to permit the arbitrability issue to be resolved by the tribunal, the court will consider all the circumstances of the case. Factors which are likely to be of significance include the following:

(a) Whether the arbitrability issue is likely to fall to be resolved by the court in any event, for example in the context of enforcement of an award. If so, this will be a powerful factor in favour of the court deciding the issue rather than leaving it in the first instance to the arbitral tribunal.

(b) Whether the resolution of the arbitrability issue will involve findings of fact or law which impact on the substantive rights and obligations of the parties in relation to their underlying dispute, or only affects the question whether such rights and liabilities are arbitrable. In the latter case, the court can conduct the inquiry without risk of interfering with D's right to have his chosen tribunal decide the disputes, because if the issue is resolved in D's favour, there will be a stay in favour of the tribunal without the court having trespassed into considering issues which affect the merits of the underlying dispute. On the other hand where, as is not uncommon, the determination of the issue whether there is an effective agreement to arbitrate is bound up with the issues which arise in relation to the underlying dispute, there is a balance of prejudice to each party to be taken into consideration. It may be more efficient and just to leave the arbitrability issue to be dealt with by the tribunal where, if the issue is resolved in D's favour, he can at the same time obtain an award on the merits from his chosen tribunal. Against this is to be weighed the risk of any prejudice to C in being subjected to the process and decision of a tribunal on which he may not have agreed to confer jurisdiction.

(c) The length and cost of the inquiry into the arbitrability issue and how quickly it will be resolved. Where the issue cannot be resolved without a lengthy investigation, the court will be reluctant to order the issue to be tried in advance of the arbitration. This will be especially so where the trial of the issue is likely to extend widely over the substantive matters in dispute between the parties, in which case considerations of cost and convenience may be decisive: ordering a trial of the arbitrability issue will normally be inappropriate where the trial cannot be confined to a relatively circumscribed area of investigation.

(d) Whether there have been or will be related proceedings addressing the arbitrability issue between the same or other parties. If the arbitrability dispute has been or will be addressed or resolved in other proceedings, the court will be anxious to do what it can to minimise the risk of inconsistent judgments and provide for orderly case management.

(e) The degree of connection between the arbitrability dispute and England. In this context the law applicable to the arbitrability issue may be of significance. Where the law governing the issue of the existence, effectiveness or applicability of the agreement to arbitrate is English law, that will be a factor in favour of the issue being resolved by the English court rather than a foreign tribunal, unless it is clear that there is no real dispute as to the legal principles, or that the foreign tribunal is as well placed to apply those principles as an English court. Other relevant factors in this context will include the relative convenience for the parties of contesting the arbitrability question before the English court, on the one hand, or the arbitral tribunal on the other. Factors such as the location and

language of witnesses and documents and other factors commonly taken into account when considering the ***Spiliada*** discretion will here be relevant. Also relevant in this context would be the potential applicability of an English jurisdiction clause if the agreement to arbitrate did not exist or was ineffective or inapplicable, as in ***Claxton***.

(f) The strength of the arguments on the arbitrability issue. The court will not conduct a mini trial in determining whether to direct a trial of the issue. But as in other interlocutory contexts, if the court can determine on a brief perusal of the materials before it that one party has a very strong case on the arbitrability issue, the court will take this into account.

(g) The nature and quality of the arbitral tribunal and arbitral process, including the supervisory jurisdiction of the curial court. Where the English court declines to resolve the issue and leaves it to the Kompetenz-Kompetenz of the tribunal in the first instance, C has the comfort that if he is right in his contention that there is no applicable or effective agreement to arbitrate, he will have the opportunity to establish that before the tribunal, which will then decline jurisdiction. The degree of comfort will depend upon the quality of the tribunal and of the arbitral process, supported by resort to the courts having supervisory jurisdiction over the arbitral process. The degree of prejudice to C in requiring him to entrust the issue to a tribunal with whom it may transpire he has not agreed that it should be entrusted will depend upon the degree to which the tribunal can be trusted to reach the correct answer.

60. I am prepared to assume, without deciding, that Mr Craig is correct in his submission that the fact that the Addendum was concluded brings the case within s. 9(1) and that Golden Ocean's arguments of construction/implied condition and mistake are relevant to the issues raised by s. 9(4), namely whether the agreement to arbitrate in Singapore is "null and void etc". The question remains whether on a stay application the court would order a trial of those issues.

61. Applying the principles identified above, I conclude that in this case it would be appropriate for the court to decide the disputed arbitrability issue for itself. The most significant, and to my mind decisive, factor is the need to seek to minimise the risk of inconsistent judgments. That risk arises in two separate respects: there is a risk of inconsistent judgments on the arbitrability issue and there is a risk of inconsistent judgments in relation to the underlying dispute. The unusual feature of this case is that there are two separate arbitrations in progress. There is already a validly constituted London arbitration. There is an Award against HIT which confirms the tribunal's jurisdiction over HIT and which has not been challenged under s. 67 Arbitration Act 1996. The Award treats the question of whether HIT or Genuine is Golden Ocean's counterparty as a binary question: in holding that it was HIT, the arbitrator seems to have intended to decide that the counterparty was not Genuine. There is an application to the English court to enforce the Award that the charterparty was with HIT and not with Genuine. That would be inconsistent with a decision by a Singapore tribunal and/or the Singapore court that the charterparty was with Genuine. Moreover the English arbitration is continuing. The next stage is a determination of the merits of the dispute in which the arbitrator will potentially award sums in favour of, or against, Golden Ocean or HIT, on the basis that HIT was the disponent owner.

Such an award, if made against Golden Ocean in favour of HIT, would expose Golden Ocean to double jeopardy if the Singapore proceedings were allowed to continue, because the latter might potentially result in an award against Golden Ocean of the same sums in favour of Genuine. The English court is a single forum to which all parties, including HIT, are amenable and in which they can participate. If the court decides the arbitrability dispute now in favour of Genuine, it can decline to enforce the Award and the position will be open for the merits to be decided by a Singapore tribunal. If, on the other hand, the court decides the arbitrability issue in favour of Golden Ocean (and grants an anti-arbitration injunction, as to which see below) the risk of inconsistent judgments in both respects is avoided.

62. There is also a strong connection between the arbitrability issue and England. The issue arises already in the context of the London arbitration against HIT. It is governed by English law as the proper law of the Addendum and the putative proper law of the arbitration agreement in Clause 1. Mr Craig initially suggested that the arbitrability issue would be governed by Singapore law as the curial law of the seat of arbitration, but ultimately accepted, correctly in my view, that English law applied. The charterparty was concluded prior to 17 December 2009 and the applicable law of that contract falls to be determined by reference to the Contracts (Applicable Law) Act 1990 which gave force of law to the Rome Convention on the Law Applicable to Contractual Obligations. Under the 1990 Act the applicable law of the charterparty is English law, being the law chosen by the parties. By reason of the agreement to English law in clause 17 of the charterparty, English law is also the governing law of the distinct London arbitration agreement. Clause 1 of the Addendum itself contains an express reference to English law (…*disputes arising under the Charterparty to be determined by arbitration in Singapore under English law…)* which is inconsistent with an intention to amend the governing law of the arbitration agreement. The putative contract seeks to alter the venue of the arbitration but not the governing law of the charterparty or of the arbitration agreement itself. The putative contract to amend the arbitration agreement in the original charterparty therefore falls to be construed under English law, which also applies to the question whether it is void for mistake.

63. In a dispute which raises questions as to the doctrine of mistake and implied conditions in that context, the English court is bound to be better placed to divine and apply the nuances of English law than a Singapore arbitral tribunal, from whom there may be limited rights of appeal on what might be treated in that jurisdiction as a dispute of fact. Whilst I had no evidence before me of Singapore law, the court has judicial notice of the fact that although it shares a common law tradition with English law, it does not follow English common law in all respects. Moreover there is a risk that the submission initially made to me on behalf of Genuine that Singapore law applies will be repeated to the Singapore tribunal. If so, that makes it all the more appropriate for the English Court to address the arbitrability issue now.

64. Each party argued that considerations of the convenience for the parties of dealing with the issue in England or Singapore, such as the language and location of witnesses, and location of documents, favoured their case. I would regard them as relatively evenly balanced, and of little weight in this context.

65. There may also be, as I indicated earlier, an advantage to Golden Ocean in terms of enforcement against HIT in this court considering the arbitrability question itself.

Whilst that would not have been sufficient if the question only arose vis a vis enforcing the Award against HIT, it provides a minor additional reason for the court to address the issue in the context of the dispute with Genuine.

66. It is true that the trial of the disputed arbitrability issue will take some days and require disclosure and oral evidence. It is unusual for the court to consider embarking on such a substantial exercise to resolve a jurisdictional question. But that investigation must take place wherever the arbitrability issue falls to be determined; if not in this court, it would have to be addressed by the Singapore tribunal. It is true, also, that the issue to be addressed by the court is more than merely a jurisdictional question, being one which affects the substantive liabilities of the parties, not merely where their underlying disputes should be resolved: it determines which of HIT and/or Genuine is liable to pay or be paid claims worth several million dollars if such claims be valid. But the court is not risking cutting across Genuine's entitlement to have that substantive issue decided by its chosen tribunal: if the court resolves the arbitrability issue in favour of Genuine, the substantive claims will be heard in a Singapore arbitration; if the court resolves it in favour of Golden Ocean, Genuine will not be deprived of the benefit of any applicable arbitration agreement because it will be held that there is no effective and applicable arbitration agreement.

67. In my judgment this is not a case in which it would be right to wait for the decision of the Singapore tribunal on the basis that if it decided the arbitrability issue against Genuine the problem would go away. It appears that the Singapore arbitration proceedings are likely to involve considerable dispute and expense. Genuine is challenging Mr Baker-Harber's appointment as an arbitrator. Golden Ocean may dispute the appointment of Mr Shetty, given the previous purported appointment of Mr Prakash. If at the end of the process the Singapore tribunal accepts jurisdiction, there remains the risk of inconsistent judgments, and there is a danger of tactical manoeuvring on both sides if there are parallel proceedings, with the result that Golden Ocean might be in a more disadvantageous position to make the current application having had to await the outcome in Singapore, quite apart from the prejudice of being subjected to the cost and delay involved. In the meantime there is the application to enforce the Award against HIT in this country and the further progress of the arbitration to decide the merits of the claims. In the words of Brandon LJ in ***The El Amria*** [1981] 2 Lloyd's Rep 119 at p.128 "*there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata or issue estoppel in the latter…".* There is considerable force in Mr Gee QC's submission that the court should grasp the nettle now.

68. Mr Craig submitted that there were reasons of comity why this court should not embark upon the question, because it would, he submitted, constitute an unwarranted interference with the liquidators who are officers of the Singapore court and subject to its direction and control. I found this argument difficult to follow. Genuine is not in liquidation, although its parent, HST is. The evidence before the court suggests that Genuine owes a very large sum to Hanjin, such that any recovery from Golden Ocean would not go to the creditors of HST but directly to Hanjin. It is not apparent that the liquidators of HST have any interest in these proceedings in their capacity as liquidators, although they are also directors of Genuine. Genuine is a Panamanian company which appears to be insolvent.

69. For these reasons the threshold question is to be answered in Golden Ocean's favour.

Issue 3: Is England clearly the appropriate forum for the resolution of Golden Ocean's declaratory claims?

70. This question is resolved in Golden Ocean's favour by the factors I have identified when considering the threshold question under Issue 2.

Issue 4: Is there a serious issue to be tried that the court will grant a final anti-arbitration injunction?

71. In a judgment on a further aspect of the dispute in ***Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KTF*** [2011] EWHC 345, Hamblen J said:

> "27. The grant of an anti-arbitration injunction is a matter of debate and controversy in the international arbitration community - see, for example, the article by Professor Lew in AMU International Law Review 2009, 489, "Does national court involvement undermine the international arbitration process?"; - see also Shearer and Jaynel 2009 International ALR: "Anti-suit and anti-arbitration injunctions".
>
> 28. It is nevertheless clear that the English courts have jurisdiction to grant such injunctions. See, for example, ***Intermet FZCO v Ansol Limited*** [2007] EWHC 226; ***Elektrim SA v Vivendi Universal SA Number 2*** [2000] 2 Lloyd's Rep 8; ***J Jarvis and Sons Limited v Blue Circle Dartford Estates Limited*** [2000] BLRep 439; ***Albon v Naza Motor Trading SDN BHD*** [2002] Lloyd's Rep 420 [2008] 1 Lloyd's Rep 1; ***Cetelem SA v Roust Holdings Limited*** [2005] 2 Lloyd's Rep 494 per Clarke LJ at paragraph 74; ***Weissfisch v Julius*** [2006] 1 Lloyd's Rep 716 per Lord Phillips CJ at paragraph 33; Republic ***of Kazakhstan v Istil Group Inc (No 2***) [2008] 1 Lloyd's Rep 382.
>
> 29. Modern examples of the English court granting such injunctions are the ***Republic of Kazakhstan v Istil Group Inc*** case and, in respect of an arbitration outside the jurisdiction, the ***Albon*** case. The authorities indicate that such injunctions will generally only be granted in exceptional circumstances - see ***Weissfisch v Julius*** at paragraph 33; ***Republic of Kazakhstan v Istil*** paragraph 48.
>
> 30. This is consistent with the doctrine of Kompetenz Kompetenz and with the "principles of the law of international arbitration, agreed under the New York Convention and recognised by this country in the 1996 Act" - see ***Weissfisch v Julius*** paragraph 33.
>
> 31. The significance of the provisions of the 1996 Act was addressed in some detail by Aikens J in ***Elektrim*** at paragraphs 67 to 73; see also the decision of Coleman J in ***A v B*** [2001] Lloyd's Law Rep 237, paragraph 124.

> 32. The need for caution in the grant of such injunctions is all the greater in relation to arbitrations outside the jurisdiction because such matters are generally best left to the relevant supervisory courts being the courts of the country of the seat of the arbitration.
>
> 33. As stated in ***Naviera Amazonica Peruana SA v Cia International De Seguros Del Peru*** [1988] 1 Lloyd's Report 116, at page 118 (Kerr LJ):
>
> " ... every arbitration must have a 'seat or *locus arbitri* or forum which subjects its procedural rules to the municipal law which is there in force. ... Prima facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the 'seat' of the arbitration. The *lex fori* is then the law of X and accordingly X is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X."
>
> 34. In order to establish exceptional circumstances, it will usually be necessary, as a minimum, to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable, these being the principles which govern the grant of injunctions to restrain proceedings in a foreign court — see ***Elektrim*** at paragraph 56. However this may not be sufficient as the ***Elektrim*** decision illustrates – see paragraphs 74 and 75."

72. Mr Craig ultimately accepted on behalf of Genuine that if there is a real prospect of the court granting the declaratory relief being sought by Golden Ocean against Genuine, there is a serious issue to be tried that the court would grant a final anti-arbitration injunction if it resolved the issues in favour of Golden Ocean. That concludes the issue on the present application, although it will of course be for the court asked to grant a final anti-arbitration injunction to consider the factors to which Hamblen J has drawn attention.

Issue 5: Should the Court grant an interim anti-arbitration injunction?

73. This issue is governed by ***American Cyanamid*** principles. The court is concerned to avoid the least irremediable prejudice to each party. If an injunction is granted to hold the position until the issue is decided by the English court, including whether there should be a final anti-arbitration injunction, the only prejudice which Genuine will suffer is one of delay. That is not a very weighty consideration in relation to an arbitration which has only recently commenced, or recommenced, on a claim which arose in 2009. If, on the other hand, the Singapore proceedings are allowed to continue in the meantime, Golden Ocean will be subjected to considerable inconvenience and expense in what can be anticipated to be a series of hard fought

interlocutory battles as to the constitution of the tribunal, and thereafter in relation to the jurisdiction issue itself which will have to be addressed in two fora at the same time. The costs may well prove irrecoverable by Golden Ocean from Genuine, which on the current evidence appears to be a heavily insolvent Panamanian company. The balance of convenience is in favour of granting an interim injunction to avoid unnecessary duplication and expense, so as to put the Singapore arbitration on hold pending the determination of the jurisdiction issue by this court.

Conclusion

74. I will therefore grant permission to serve out of the jurisdiction on HIT and Genuine, grant an interim anti-arbitration injunction against Genuine, and give directions for a trial of the issues in the action.

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