The "Titan Unity"
[2013] SGHCR 28

Case Number	: Admiralty in Rem No 276 of 2012 (Summons No 4021 and 4490 of 2013)
Decision Date	: 19 December 2013
Tribunal/Court	: High Court
Coram	: Shaun Leong Li Shiong AR
Counsel Name(s)	: Mr Toh Kian Sing SC, Mr Ting Yong Hong and Mr Nathanael Lin (Rajah & Tann LLP) for the plaintiff; Mr Chan Leng Sun SC (Baker & McKenzie.Wong & Leow) instructed by Mr Dennis Tan and Mr Edwin Cai (DennisMathiew) for the first defendant; Mr Thio Shen Yi SC (TSMP Law Corporation) and Mr Kenneth Tan SC (Kenneth Tan Partnership) instructed by Ms Tan Mui Tze (Pan Asia Wikborg Rein LLC) for the second defendant.
Parties	: The "Titan Unity"

Arbitration – International Arbitration Act (Cap. 143A, 2002 Rev Ed) – Threshold to determine the existence of an arbitration agreement in order to invoke the court's jurisdiction to grant a stay pursuant to section 6 of the International Arbitration Act (Cap. 143A, 2002 Rev Ed)

19 December 2013 Judgment reserved.

Shaun Leong Li Shiong AR:

Introduction

1 The central question raised in the present application concerns the threshold to be applied to determine the *existence* of an arbitration agreement in order to invoke the court's jurisdiction to grant a stay in favour of arbitration pursuant to section 6 of the International Arbitration Act (Cap. 143A, 2002 Rev Ed) ("IAA").

Background

2 The plaintiff, a bank registered under the laws of Germany, provided financing to a company known as Onsys Energy Pte Ltd ("Onsys") for the purchase of a cargo of fuel oil by the issuance of a letter of credit dated 20 January 2012. As the lawful holder of bills of lading dated 26 January 2012 acknowledging the carriage of a cargo of 5,003.373 MT of fuel oil 380CST on board the vessel ("bills of lading"), "TITAN UNITY" (official no. 393242) ("the vessel"), the plaintiff commenced a claim in misdelivery of cargo by filing an admiralty in rem action against the defendants on 26 July 2012. The plaintiff claims for the sum of US$3,687,485.90 representing the invoice value of the cargo, for the direct loss arising from the defendants having delivered the cargo to third parties on 27 January 2012 without presentation of the bills of lading.

3 The second defendant ("Singapore Tankers") is the registered owner of the vessel. The first defendant ("Oceanic") is the alleged demise charterer of the vessel by way of a demise charterparty dated 17 September 2007 ("demise charterparty"), the existence of which is not admitted by the plaintiff.

4 The vessel was in the port of Singapore on or about late June 2013. The plaintiff's application

for a warrant of arrest for the vessel was granted by Assistant Registrar Wong Baochen on 24 June 2013. Subsequent to the arrest of the vessel, Singapore Tankers filed an application to set aside the admiralty writ filed by the plaintiff and to release the vessel from arrest, which is the subject matter of a separate decision.

5 The present decision relates to the application filed by Oceanic on 2 August 2013 for the admiralty action filed in the High Court against Oceanic to be stayed in favour of arbitration at the Singapore Chamber of Maritime Arbitration pursuant to section 6 of the IAA, on the ground that the plaintiff and Oceanic have agreed in writing to refer to arbitration the matters in respect of the admiralty action brought by the plaintiff. The relevant arbitration provision can be found at clause 41 of the time charterparty entered into between Oceanic and Onsys dated 1 November 2011 ("time charterparty") which provides as follows:

> All and any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration at the Singapore Chamber of Maritime Arbitration ("SCMA") in accordance with the Arbitration Rules of the SCMA ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause.

6 Oceanic's case is that the bills of lading incorporated the time charterparty, including the arbitration provision. The bills of lading read as follows:

> Shipped in apparent good order and condition by [insert name of shipper] at TUAS TERMINAL SINGAPORE onboard the Singapore steam/motor ship/tanker TITAN UNITY whereas Capt [insert name of Master] is Master bound for BUNKERS FOR OCEAN-GOING VESSELS (with liberty to call at any ports in any order, to sail without pilots and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property) a quantity said to be:
>
> [Insert description of cargo]
>
> The quantity measurement, weight, gauge, quality, nature, value and condition of the cargo unknown to the vessel and to the Master, which are to be delivered in the like good order and condition as the said port of BUNKERS FOR OCEAN-GOING VESSELS or so near thereto as the vessel can safely get, always afloat, unto [insert name of shipper] Assigns he or they paying freight for the same *as per Governing Charter Party dated - at - all the terms and exceptions contained in which Charter are herewith incorporated, including the arbitration clause and any dispute under this Bill of Lading the holder thereof and the carrier shall be bound by the decision of arbitration in accordance with the provisions of the arbitration clause in the above mentioned Charter Party.* The name and place for arbitration is available upon request from the carrier or any agents of the carrier. The amended Jason Clause and Both-to-Blame Collision Clause as adopted by the Baltic and International Maritime Conference are hereby incorporated here in and shall remain in effect even if unenforceable in the United States of America. General Average payable according to York-Antwerp Rules 1974.
>
> Paramount Clause: this Bill of Lading shall be deemed to incorporate the Hague Rules as enacted in the British Carriage of Goods by Seas Act 1974, subject however to any other Hague Rules Legislation which in the actual case is compulsorily applicable.
>
> [Insert endorsement particulars]
>
> [emphasis added]

7 The existence of the time charterparty, and by consequence, the existence of the arbitration agreement between Oceanic and the plaintiff as holders of the bills of lading, is not admitted by the plaintiff. The plaintiff did not contend that the purported arbitration agreement was null, void, inoperative or incapable of being performed. The plaintiff's case was that there was no arbitration agreement between the plaintiff and Oceanic at all. In other words, the existence of the arbitration agreement is in question. In the submissions made before this court, counsel for Oceanic took the position that the court's role at the stay stage is only to determine, *inter alia*, whether the arbitration agreement exists at the *prima facie* level. Counsel for the plaintiff however, invites the court to conduct a full examination of the evidence to determine conclusively if there is in fact an arbitration agreement on a balance of probabilities, before the court can grant a stay in favour of arbitration.

My decision

The applicable threshold

8 The provision which confers upon the court the power to stay proceedings in favour of arbitration is found in section 6 of the IAA, which provides:

> Enforcement of international arbitration agreement
>
> 6.—(1) Notwithstanding Article 8 of the Model Law, where *any party to an arbitration agreement* to which this Act applies institutes any proceedings in any court against any other party to the agreement *in respect of any matter which is the subject of the agreement*, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.
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> [emphasis added].

9 In my view, the statutory framework in section 6 contemplates a conceptual distinction between the *existence* of an arbitration agreement and its *validity*. Analogous to the exhortation made by the existentialist philosopher Jean-Paul Sartre that "existence precedes essence", the existence of an arbitration agreement is a *precondition* to its legal validity. The questions in relation to the validity of an arbitration agreement concern the legal effect of an agreement, and whether the agreement is legally binding between the parties. When determining these questions, the existence of the agreement is presupposed, without which no issue of validity arises. This distinction is recognized in the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), where article 16(1), in prescribing the arbitral tribunal's power to determine its own jurisdiction, refers in the conjunctive to "the *existence or validity* of the arbitration agreement". Section 6(2) of the IAA mandates the court to examine the *validity* of an arbitration agreement in so far as a stay must be refused if it is satisfied that the arbitration agreement is *null and void, inoperative or incapable of being performed*. The court's jurisdiction to grant a stay however, is not invoked, if the threshold preconditions found in section 6(1) are not satisfied. As the Court of Appeal in *Tjong Very Sumito and other v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") held at [22], "[i]n order to obtain a stay…the party applying for a stay must first show that he is a party to an arbitration agreement, and that the proceedings instituted involve a matter which is the subject of

the [arbitration] agreement". Reference can in the same regard be made to the English decision of *Albon v Naza Motor Trading Sdn Bhd (No. 3)* [2007] EWHC 327 (Ch) ("*Naza Motor*"), where Lightman J reviewed section 9 of the English Arbitration Act 1996 (the equivalent of section 6 of the IAA) which reads:

> Stay of legal proceedings
>
> 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.

10 Lightman J deconstructed the statutory framework for the court's jurisdiction to grant a stay found in section 9 as follows:

> An arbitration agreement is constituted when it is brought into existence. … To say that an arbitration agreement exists may mean that it has been brought into existence and may mean that at any relevant point in time it continues to exist. The [other term] is "validity". An arbitration agreement is valid if in law it is at the relevant point in time legally binding on the parties.
>
> …
>
> The first question is what … Naza Motors needs to establish as conditions precedent to invoking the jurisdiction conferred by section 9(1) to grant a stay of court proceedings. In my judgment the language of section 9(1) plainly establishes two threshold requirements. The first is that there has been concluded an arbitration agreement and the second is that the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration. The first condition is as to the conclusion and the second is as to the scope of the arbitration agreement.

11 Section 6(1) of the IAA, which makes express reference to "any party to an arbitration agreement", therefore imposes two threshold pre-conditions an applicant must satisfy if the court's power to grant a stay is to be invoked. First, the *existence* of an arbitration agreement must be established in that the applicant must show that it is a party to an arbitration agreement with the party who instituted the court proceedings. This necessitates the applicant to show that there exists a state of affairs to support the finding of an "arbitration agreement", which is defined in section 2A(1) of the IAA as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". Second, the applicant must show that the proceedings instituted in court are in respect of any matter which is the subject of the arbitration agreement. If neither one of these preconditions are satisfied, the court has no jurisdiction to grant a stay under section 6 of the IAA. When these two threshold preconditions have been satisfied, the court must grant a stay unless it is satisfied that the arbitration agreement invalid, in so far as it is null and void, inoperative or incapable of being performed. The second precondition in relation to the scope of the arbitration agreement is

not in question in the present case. Neither is the validity of the agreement in question. The issue before this court is whether the arbitration agreement between the plaintiff and Oceanic exists. The ordinary reading of section 6 however provides no guidance as to the extent in which the court is required to enquire into the existence of an arbitration agreement. What then, would be the threshold in determining the existence of an arbitration agreement? Is it sufficient that the court finds on a summary determination that a *prima facie* arbitration agreement exists, or is the court mandated to conduct a full examination on the merits of the existence of an arbitration agreement?

12 It is helpful to refer to the decision of *Tjong Very Sumito*, where the Court of Appeal held that it is *only in the clearest of cases* where the court proceedings do not fall within the subject matter of the arbitration agreement that the court would not have jurisdiction to grant a stay under section 6:

> We noted that both Woo J in *Dalian* [*Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646] and Lightman J in *Nigel Peter Albon v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 665 (Ch) (in the context of whether an arbitration agreement had been concluded) took the position that it is the court that determines whether the arbitration agreement applies; although Woo J was quick to add the important caveat that *if it was at least arguable* that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. We agree with the measured approach taken by Woo J since the question of whether a matter is the subject of an arbitration agreement is the very threshold to the application of s 6 of the IAA itself. However, *it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement.* The court's jurisdiction to grant a stay is satisfied once the prerequisites of s 6 appear to have been met. If there is no binding arbitration agreement or if the arbitration agreement has no application, then the court has no jurisdiction to grant a stay under s 6 of the IAA, although it is of course open to the court to do so under its inherent jurisdiction.
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> [emphasis added].

13 The above exposition made by the Court of Appeal however relates to the second precondition on the scope of an arbitration agreement. Senior Counsel for both the plaintiff and Oceanic agree that there is as yet no local authority on the threshold for determining the first precondition which relates to the existence of an arbitration agreement in order to invoke the court's jurisdiction to grant a stay under section 6 of the IAA. Nevertheless, the threshold for determining the second precondition may very well apply to the determination of the existence of an arbitration agreement (the Court of Appeal did hold that "[t]he court's jurisdiction to grant a stay is satisfied once the prerequisites of [section] 6 *appear* to have been met" [emphasis added]), as this would aid in the policy of preventing dilatory tactics adopted by litigants who wish to obviate the arbitration route by placing tactical jurisdictional objections before the court. The force of this policy is however premised upon the assumption that parties have *consented* to arbitration, which is the question which the court granting the stay has to determine in the very first place (albeit the threshold or extent in which the court has to make this determination is not clear), and is countervailed by the equally valid policy consideration of ensuring that parties do not expend unnecessary resources in arbitration proceedings if the very foundation of that proceedings, which is *consent*, is lacking.

14 The balance to be reached amongst these two competing policy considerations is dependent upon the degree of deference accorded to the doctrine of *Kompetence-Kompetence*, which is conferred the force of law in Singapore via section 3 of the IAA and article 16 of the Model Law. The positive conception of the doctrine, which refers to the arbitral tribunal's power to determine its own jurisdiction, is expressed in article 16(1) (see Emmauel Gaillard and Yas Banifatemi, *Negative effect of Competence-Competence: the Rule of Priority in Favour of the arbitrators*, in Enforcement of

Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257-258 (Gaillard and Di Pietro, eds., 2008) ("*Gaillard and Banifatemi*")). The present application before this court however requires a nuanced consideration of the extent of deference which ought to be accorded to the negative conception of the doctrine, and this relates to the absence of the court's power to determine the arbitral tribunal's jurisdiction, at least at the preliminary stage at the start of the arbitral life cycle. This exercise would in turn require a review of the Model Law's *travaux préparatoires* via section 4 of the IAA.

15 Counsel for the plaintiff relied upon the writings of Gary Born, who highlighted that the drafters of the Model Law rejected in 1983 a proposal that would have expressly provided in the present article 8(1) of the Model Law for the courts to refer the proceedings to arbitration unless the court "finds that the [arbitration] agreement is *manifestly* null and void" [emphasis added], and that this rejection signifies the intent of the drafters for the courts to make a full determination on the arbitral tribunal's jurisdiction (Gary B. Born, *International Commercial Arbitration* (2009, Kluwer Law International), p 882, which makes reference to *Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, UN Doc. A/CN.9/233, XIV UNCITRAL Y.B. 60, 67 (1983); H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 303 (2013) ("*Holtzmann & Neuhaus*")). This analysis, however, relates to the validity of the arbitration agreement in the determination of whether it is null, void, inoperative or incapable of being performed, and not to the existence of the arbitration agreement. As highlighted above, the question of validity is a separate question which does not arise if no agreement is found to exist in the first place. I find more guidance in adopting a wider study of the relevant legislative history as submitted by counsel for the defendant, via the article by Frederic Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?* (2013 Kluwer Law International BV) ("*Frederic Bachand*"). In this regard, I start with a reference to the Working Group's Fourth draft dated 29 November 1983 (A/CN.9/WG.II/WP.48) (*Holtzmann & Neuhaus* at p500), where the drafters of the Model Law considered a draft article 17 which expressly provides a party the recourse of seeking a court's ruling on whether there exists a valid arbitration agreement:

> Article 17. Concurrent court control
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> (1) [Notwithstanding the provisions of article 16,] [a party may] at any time [request the Court specified in article 6 to decide ***whether or not there exists a valid arbitration agreement*** and], if arbitral proceedings have commenced, whether or not the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].
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> [emphasis added]

16 The year after, the Working Group decided to *delete* the draft article 17 from the Model Law, such that no party will have the recourse of seeking a court's ruling on whether there exists a valid arbitration agreement. This is so that the arbitral tribunal can have the *initial* determination of its own jurisdiction (see the Fifth working group report dated 6 March 1984 (A/CN.9/246)) (*Holtzmann & Neuhaus* at p502):

> 53. The text of article 17 as considered by the Working Group was as follows:
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> …
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> 54. The Working Group decided to delete that article.

55. It was noted that the concurrent court control provided for in that article was to a large extent in conflict with the provision in the last sentence of paragraph 3 of article 16, which precluded a party from contesting an affirmative ruling by the arbitral tribunal on its jurisdiction until the final award on the merits was made. … The prevailing view was in favour of deleting article 17 since it might have adverse effects throughout the arbitral proceedings by opening the door to delaying tactics and obstruction and because *it was not in harmony with the principle underlying article 16 that it was* ***initially and primarily*** *for the arbitral tribunal to decide on its competence, subject to ultimate court control.*

[emphasis added]

17 Article 17 was placed before the Working Group a year later for consideration again, and a decision was made not to reintroduce the article on the basis that the preferred approach is found in what is essentially the present article 16 of the Model Law (See Commission Report dated 21 August 1985 (A/40/17) (*Holtzmann & Neuhaus* at p528):.

161. The Commission, after deliberation, decided not to reintroduce previous draft article 17 but to provide for instant court control in article 16(3) along the lines of the solution adopted in article 13(3). The Commission adopted article 16(3) in the following modified form, subject to redrafting by the Drafting Group:

"(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal determines in a preliminary ruling that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in article 6 to decide the matter, which decision shall not be subject to appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings."

18 It is therefore evident that the intention of the drafters of the Model Law was to accord primacy to the negative conception of the doctrine of *Kompetence-Kompetence*, in so far as the arbitral tribunal will be given the priority ahead of the courts to decide whether there exists a valid arbitration agreement in the determination of the arbitral tribunal's own jurisdiction.

19 Notwithstanding so, counsel for the plaintiff submitted two English decisions in support of the position that the court would have to conduct a full examination on the merits on the existence of an arbitration agreement concluded between parties before the jurisdiction to grant a stay in favour of arbitration arises. The first is a decision already referred to, in *Albon*, where it was held that the court must consider the evidence and make a decision on whether the arbitration agreement has been concluded between the parties before the jurisdiction to grant a stay under section 9 of the English Arbitration Act 1996 arises. The court was even open to the option of conducting a full trial to determine the issue. The second is the decision of *Anglia Oils Ltd v The Owners and Demise Charterers of the Vessel Marine Champion* [2002] EWHC 2407, where the court held that the question of whether the ship owner was a party to the arbitration agreement was not a question which should be decided by the arbitral tribunal, but one which must be determined by the court on the evidence placed before it before a stay may be granted.

20 It is unclear how these two decisions may be reconciled with the House of Lords' decision in *Premium Nafta Products Ltd v Fili Shipping Co. Ltd*. [2007] UKHL, where it was held, with regard to the court's power to grant a stay of proceedings in favour of arbitration pursuant to section 9, that "it is contemplated by the [Arbitration] Act that it will, in general, be right *for the arbitrators to be the first tribunal* to consider whether they have jurisdiction to determine the dispute" [emphasis

added]. More significantly, the two decisions submitted by counsel must be considered in light of the fact that the Model Law, which includes the doctrine of *Kompetence-Kompetence*, entrenched in article 16, does not have the force of law in England, unlike the position in Singapore. In addition, the procedure for a stay in England is shaped by a provision which is not found in Singapore. Rule 62.8(3) of the English Civil Procedure Rules prescribe the court's power to decide on the question of whether an arbitration agreement has been concluded, or to give directions for a trial to determine that question, before a stay in favour of arbitration is granted.

21 It would in my view be more useful to refer to the decisions of jurisdictions which have accorded the Model Law the force of law, in order to achieve a more uniform interpretation of the relationship between article 16 of the Model Law and section 6 of the IAA consistent with international normative conceptions of *Kompetence-Kompetence*.

22 The Canadian position in general adopts a *prima facie* determination of the existence of an arbitration agreement, as adopted in several decisions (*Rio Algom Ltd v Sami Steel Co Ltd*, XVIII Y.B.Comm.Arb. 166 (1993); *Agrawest Investments Ltd v BMA Nederland BV* [2005] PEIJ No 48; *Morran v Carbone* [2005] OJ No 409; *ETR Concession Co v Ontario (Minister of Transportation)* [2004] OJ No 4516; *Cooper v Deggan* [2003] BCJ No 1638). In particular, the British Columbia Court of Appeal in *Gulf Canada Resources Ltd v Arochem Int'l Ltd* 66 B.C.L.R.2d 113 held:

> …it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement, because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement, or that a party is not a party to the arbitration agreement…should the court reach any final determination…Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.
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> [emphasis added]

23 The position in Hong Kong is similar. Two decisions ought to be highlighted. In *Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co Ltd*, XVIII Y.B. Comm. Arb. 180 (H.K. S.Ct. 1992) (1993), the claimant initiated arbitration proceedings pursuant to an arbitration agreement contained in a charterparty entered into between the parties through a broker. The defendant refused to participate in the proceedings, and the claimant applied to the High Court of Hong Kong for the appointment of an arbitrator. The defendant contended that no arbitration agreement existed between the parties on the ground that the broker was not given the requisite authority to enter into the charterparty. The court held:

> If the court is satisfied that there is a 'plainly arguable' case to support the proposition and there was an arbitration agreement which complies with Article 7 of the Model Law, the Court should proceed to appoint the arbitrator in the full knowledge that the defendants will not be precluded from raising the point before the arbitrator and having the matter reconsidered by the court consequent upon that preliminary ruling.
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> …
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> Obviously it has not been possible for me to go into this in any great detail and indeed the whole matter has been dealt with the affidavit evidence. Despite the fact that there is no document

before me, which shows that World Ace were held out or authorised by the defendant to act for them in relation to its fixture, I cannot believe that such documentation does not exist. The arbitrator will have to go into this matter and sort it out but for my part I am satisfied at this stage that Article 7 of the Model Law has been complied with and that there is an arbitration agreement between these parties.

24 The second decision is that of *PCCW Global Ltd v Interactive Communications Service Ltd* [2006] HKCA 434, where Beyond the Network Ltd claimed against Vectone Ltd for billing discrepancies in invoices arising from an agreement for the supply of international long distance communications services. The agreement contains a clause which submits all disputes to the exclusive jurisdiction of Hong Kong, a clause which states that the agreement is governed by the laws of the State of New York, such that "any dispute shall be submitted to the courts" of that State, and an apparent arbitration clause which allows either party to refer any dispute to arbitration under the auspices of the American Arbitration Association. Vectone Ltd relied upon this apparent arbitration clause in its application to stay the Hong Kong court proceedings in favour of arbitration, pursuant to article 8 of the Model Law via section 34C of the Hong Kong Arbitration Ordinance (Cap. 341). Given the apparent contradiction between the three different dispute resolution clauses in the agreement, the issue before the Hong Kong Court of Appeal was whether there exists an arbitration agreement between parties. Hon Tang VP endorsed the *prima facie* threshold adopted by an earlier Hong Kong Court of Appeal decision in *In Private Company 'Triple V' Inc v Star (Universal) Co Ltd and Anor* [1995] 3 HKC 129:

> If the judge were to go into the matter more deeply, he would in effect be *usurping the function of the arbitrator*. Whilst, clearly, the judge had to make a judgment as to whether there existed an underlying agreement to arbitrate, he could do no more than to form a *prima facie view*.
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> [emphasis added]

25 Hon Tang VP further endorsed the same approach adopted by Burrell J in *Pacific Crown Engineering Ltd v Hyundai Engineering and Construction Co Ltd* [2003] 3 HKC 659, where the court was concerned with the proper test to be applied in determining the question of whether it was for the court on a stay application or the arbitrator to decide whether an arbitration agreement existed:

> The proper test is therefore is there a *prima facie* or plainly arguable case that the parties were bound by an arbitration clause. The onus being on the defendant to demonstrate that there is."

26 I move on to consider the position adopted by the apex court of India. The decision of the Supreme Court of India in *Shin-Etsu Chemical Co. Ltd v Aksh Optifibre Ltd* (2005) 3 Arb LR 1 is highly instructive ("*Shin-Etsu*"). The court was not faced with the precondition issue on the existence of the arbitration agreement, but was concerned with the requisite threshold to determine the validity of the arbitration agreement under section 45 of the Indian Arbitration and Conciliation Act 1996 ("IACA 1996") (the equivalent of section 6 of the IAA), which provides:

> 45. Power of judicial authority to refer parties to arbitration.
>
> … a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

27 The Supreme Court held that the enquiry on whether there exists a valid arbitration agreement

which is not null and void, inoperative or incapable of being performed is limited to a *prima facie* standard. It found that the absence of section 8(3) in section 45 of the IACA 1996, which is the equivalent of article 8(2) of the Model Law that expressly allows arbitration proceedings to continue and an award to be made notwithstanding an application for stay of proceedings, necessitates an inference that arbitral proceedings will not commence or continue until such time the nature of the agreement is decided upon, and that if such a decision requires a full review on the merits of the validity of the arbitration agreement, the delay caused would defeat the objective of the IACA 1996 to enable expeditious arbitration with limited court interference (see Justice R.S. Bachawat, *Law of Arbitration & Conciliation* (5th ed, 2010, Chapter 2). The Supreme Court took the view that there is nothing to prevent the arbitral tribunal from conducting a full determination on the validity of the arbitration agreement, which is allowed under article 16 of the Model Law, if the court takes the view of the agreement's validity on a *prima facie* basis. More significantly, the Supreme Court found that a full determination of the question at the stay stage would render superfluous section 48(1)(a) of the IACA 1996, which is in *pari materia* with article 36(1)(a)(i) of the Model Law and article V(1)(a) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") (at [84]):

> If a final finding were to be made upon the arbitration agreement, finding it valid and operative, such a finding might operate as res judicata. Thus one ground made available by Parliament under Section 48(1)(a) to assail the award at the post-award stage, by impugning the validity of the arbitration agreement, would be totally precluded because the finding under Section 45 on the said issue would be final.
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> …
>
> If the approach [of conducting a full review] … in interpreting Section 45 were to be adopted, it could effectively make a part of the provision in Section 48(1)(a) redundant; an outcome which Parliament could surely not have intended.

28 Counsel for the plaintiff submitted that *Shin-Etsu* should be re-considered in light of the more recent decision of the Supreme Court of India in *Chloro Controls (I) P. Ltd. V Seven Trent Water Purification* (Civil Appeal No 7134 of 2012), where there were pronouncements made which suggest that the court must make a "final" finding on whether the arbitration agreement is null and void, inoperative or incapable of being performed. This submission can be easily dismissed on the basis that the Supreme Court decision was determined by a provision which is unique to India and which has no equivalent in Singapore: section 11(7) of the IACA 1996. The Supreme Court held (at [130]) that, "[t]he underlying principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45". Section 11(7) confers upon the Chief Justice of India the power to make a determination in several matters in the arbitral process, and expressly prescribes that such determination shall be final.

29 Contrary to counsel's submissions, this court is of the view that there is much force in the analysis adopted by the Supreme Court in *Shin-Etsu*. By parity of reasoning, the court's role at the early stage to determine on a *prima facie* standard whether there exists an arbitration agreement between the parties in deciding whether a stay can be granted under section 6 of the IAA, is consistent with the approach of having a full determination of that question deferred to the arbitral tribunal subject to *ultimate* court control at the *end* of the whole arbitral life cycle, with the control taking the form of either the setting aside of the award via article 34(2)(a)(i) of the Model Law or the refusal of enforcement via article V(1)(a) of the New York Convention, both of which have the force of law in Singapore, and which confer upon the court the full jurisdiction to review and determine on the merits whether there exists an arbitration agreement concluded between the parties (see, in the

context of article V(1)(a) of the New York Convention, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 ("*Dallah*")). This approach has the benefit of consolidating the court's review of disputes associated with international arbitration at the end of the arbitral life cycle, in so far as the court's fullest jurisdiction to determine the existence of an arbitration agreement remain with the same courts having jurisdiction to review arbitral awards (see *Gaillard and Banifatemi*). The desirable end result would be to prevent inconsistent decisions on the existence of the arbitration agreement and potential complications arising from arguments based on issue estoppel between the court seized of the stay application, the supervising court and the enforcing court. The experience from the well-known *Dallah* episode is edifying in this regard.

30 I add here parenthetically that there appears to be some suggestion from the materials submitted that there could be a hybrid approach taken, such that a *prima facie* standard of review be adopted when the seat of the arbitration is in the jurisdiction of the court seized of the stay application, while a full determination on the existence of an arbitration agreement be made where the seat of arbitration is located in a foreign jurisdiction (see *Frederic Bachand* (at footnote 44) referring to some decisions of the Swiss courts in Trib. Féd., 16 January 1995, *Bull*. ASA 503 (comm. J. F. Poudret and G. Cottier); Trib. Féd., 29 April 1996, *Bull*. ASA 527 (comm. C. U. Mayer)). It was not submitted by counsel that this hybrid approach should be the approach in Singapore. This court is in any event not in favour of such an approach, which appears to be tainted by circularity. The seat of arbitration may not be known until arbitral proceedings have commenced, and it would not be uncommon where arbitration proceedings are not commenced until the stay of court proceedings has been granted in the first place. The approach also fails to acknowledge the fact that the seat of an arbitration may be transferred amidst arbitral proceedings.

31 I find the position in Singapore to be even stronger than that in *Shin-Etsu*, given that section 10(2) of the IAA expressly confers upon the arbitral tribunal the power to rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings. Where the arbitral tribunal decides as a preliminary question that it has jurisdiction, or at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the High Court to *decide* the matter. It is evident that the statutory framework of the IAA defers the decision on the arbitral tribunal's jurisdiction to the arbitral tribunal itself – not to the extent where it is the sole arbiter of its own jurisdiction, but where it is the *first* arbiter of its own jurisdiction, with a recourse available for parties to bring that dispute on jurisdiction, which includes the determination of the existence of an arbitration agreement, to the courts only after having had the benefit of the arbitral tribunal's ruling on that question.

32 This is reinforced by the deeming provision found in section 2A(6) of the IAA, the only provision in the IAA which makes express reference to the "existence of an arbitration agreement":

> (6) Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case, or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.
>
> (7) A reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the contract.
>
> (8) A reference in a bill of lading to a charterparty or other document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that

clause part of the bill of lading.

33 It appears from the deeming provision that the enquiry into the existence of an arbitration agreement under section 6 is meant to be a quick and summary process instead of a long drawn examination into the facts.

Conclusion based on the above analysis

34 In conclusion, there is no doubt that the court must be satisfied that an arbitration agreement exists before the jurisdiction to grant a stay pursuant to section 6 is invoked. However, it is clear from the analysis above that the court only needs to be satisfied that an arbitration agreement exists on a *prima facie* level for the purposes of establishing the first precondition under section 6(1). This first precondition will not be met only in the clearest and most obvious of cases. This is not to say that the court should accept *prima facie* evidence of an arbitration agreement when it is clearly inconsistent with undisputed documentary and contemporaneous evidence, nor should the court accept uncritically every fact placed on the affidavits in support of the stay application. Nevertheless, based on the aforementioned reasons, there is no need for the court to descend into a protracted examination of the evidence to make a finding on the merits that an arbitration agreement exists on a balance of probabilities at the stay stage. With this, I turn my attention to determine whether an arbitration agreement exists in the present case.

On the prima facie standard, is there an arbitration agreement?

35 The face of the bill of lading makes express and clear reference not only to the incorporation of the governing charterparty, but also the arbitration agreement found within:

> The quantity measurement, weight, gauge, quality, nature, value and condition of the cargo unknown to the vessel and to the Master, which are to be delivered in the like good order and condition as the said port of BUNKERS FOR OCEAN-GOING VESSELS or so near thereto as the vessel can safely get, always afloat, unto [insert name of shipper] Assigns he or they paying freight for the same *as per* ***Governing Charter Party*** *dated - at -* ***all the terms and exceptions contained in which Charter are herewith incorporated, including the arbitration clause*** *and any dispute under this Bill of Lading the holder thereof and the carrier shall be bound by the decision of arbitration in accordance with the provisions of the arbitration clause in the above mentioned Charter Party.* The name and place for arbitration is available upon request from the carrier or any agents of the carrier. The amended Jason Clause and Both-to-Blame Collision Clause as adopted by the Baltic and International Maritime Conference are hereby incorporated here in and shall remain in effect even if unenforceable in the United States of America. General Average payable according to York-Antwerp Rules 1974.
>
> [emphasis added].

36 Counsel for the plaintiff took issue with the fact that the date of the charterparty was not filled in, but this does not in my view prevent the incorporation of the time charterparty. As the English Court of Appeal decision in *The "San Nicholas"* [1976] 1 Llod's Rep 8 (*San Nicholas*) held:

> …the question is the effect of the incorporation clause which has several blanks which have not been filled in. [Counsel] says that, as a result of those blanks, the incorporation clause is worth nothing. It is meaningless. It is not possible, he says, to incorporate a charter which is not identified in any way.

…

> I cannot for a moment agree with that contention. It seems to be plain that the shipment was carried under and pursuant to terms of the head charter. The blanks were left because the master … did not know its date and the parties to it so as to be able to fill them in.

37 The English Court of Appeal endorsed the statement in *Scrutton on Charterparties*, (18th ed. (1974)), at p 63:

> I t *not infrequently* happens that, when a printed form of bill of lading provides for the incorporation of the "charterparty dated ____", the parties omit to fill in the blank. It is submitted that the effect is the same as if the reference were merely to "the charterparty" and the omission does not demonstrate an intent to negative the incorporation.
>
> [emphasis added]

38 Oceanic has already given evidence by way of affidavit that the date of the time charterparty was not filled in as the issuer did not have the dates to hand at the time the bills of lading were signed (Rolf Zapffe's 1st affidavit at paragraph 42). Counsel for the plaintiff however took further issue with the fact that the blanks which were supposed to include the date of the time charterparty were filled with dashes, and that this represents the intention not to incorporate any charterparty terms. Not only was there no authority submitted in support of such a position, it is not for this court to speculate on what the intention was in the face of the evidence placed on record by Oceanic. I note that the plaintiff did not adduce any evidence to the contrary on affidavit. More significantly, this court has to give not insubstantial weight to the express reference to the charterparty and the arbitration agreement as stated on the face of the bills of lading. While the dates of the time charterparty have not been filled, this is, as shown in *San Nicholas*, not uncommon and is certainly not in and of itself sufficient to prevent the incorporation of the time charterparty and the arbitration agreement expressly referred to on the face of the bills of lading. A different form could have been used, or the reference to the charterparty and the arbitration agreement struck out if there was no intention to incorporate the charterparty. If the plaintiff takes issue with the veracity and the weight which ought to be accorded to the evidence adduced by Oceanic, it is for them to examine the relevant witnesses before the arbitral tribunal on the circumstances surrounding the issuance of the bills of lading.

39 In addition, Oceanic has adduced credible and extensive evidence on the existence of the demise charterparty. This includes the exhibits of the protocol of delivery and acceptance confirming the delivery of the vessel into the demise charter, the ship management contract between Oceanic and Titan Ocean, the vessel's manager, in respect of technical and crewing management of the vessel, the employment contract between Titan Ocean and Captain Hidayat for his employment as master of the vessel, three agreements (dated 17 September 2007, 6 December 2011, and 21 June 2012) varying the terms of the demise charter, and hire invoices for the months between May 2012 to May 2013 for the vessel (see Poey Chin Yang's 1st affidavit). The same applies for the time charterparty. The time charterparty between Oceanic and Onsys exhibited in the first affidavit of Poey Chin Yang was delivered into the time charter at 1800 on 31 December 2011 as confirmed by the on-hire delivery statement (also exhibited at page 236 of the same affidavit). In addition, the tax invoices which confirm payment by Onsys to Oceanic for daily hire of US$6,700 per day up to 25 June 2012 (see Wilhelm Christian Magelssen's 1st affidavit) corresponds with the rate in the time charter, and are consistent with the continued existence of the time charter up to 25 June 2012.

40 Taking into consideration the totality of the evidence placed before this court, I am of the view that Oceanic has established on a *prima facie* standard the existence of the arbitration agreement with the plaintiff.

The plaintiff's cross-application

41 The plaintiff filed a cross-application on 13 September 2013 for this court to exercise its discretion under sections 6 and 7 of the Arbitration Act (Cap. 143) ("AA") to refuse Oceanic's stay application, or to order a stay in favour of arbitration subject to certain conditions, in the event where a valid arbitration agreement is found to exist. It is unclear what the plaintiff's basis is for its reliance on the AA, when *neither the plaintiff nor Oceanic* would like to proceed to arbitration under the AA. In any event, the arbitration agreement in question refers the dispute to be resolved by arbitration at the Singapore Chamber of Maritime Arbitration ("SCMA") in accordance with the Arbitration Rules of the SCMA ("SCMA Rules"). Rule 22 of the SCMA Rules prescribes:

> Unless otherwise agreed by the parties, the juridical seat of arbitration shall be Singapore. Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the Act.

42 Rule 1.2 of the SCMA Rules defines "the Act" as the International Arbitration Act (Cap. 143A). The AA is clearly not relevant in the present case.

43 The second part of the plaintiff's cross-application seeks this court to impose the following two terms if Oceanic's application for a stay is granted:

> (a) that Oceanic waive any defence of time-bar, if any, under Article III rule 6 of the Hague-Visby Rules in respect of the plaintiff's claim ("the time-bar condition"); and
>
> (b) the vessel "TITAN UNITY" arrested, or any security provided for the release of the vessel, be retained as security in the satisfaction of any arbitral award given in respect of the plaintiff's claim made in the arbitration ("the security condition").

44 At the hearing before me, counsel for Oceanic acknowledged that the security condition is a matter for the court's discretion, and did not provide any substantive arguments to persuade the court why the discretion should not be exercised in the plaintiff's favour. In view that the seat of the arbitration is in Singapore, I am of the view that it is both necessary and appropriate that the arrested vessel be retained as security in the satisfaction of any arbitral award given. The security condition is therefore allowed.

45 With regard to the time-bar condition, the plaintiff made several arguments in relation to its alleged lack of knowledge of the existence of the demise charterparty and the time charterparty. According to the plaintiff, they knew about these two charterparties only after the time bar has apparently set in. The plaintiff relied on the two decisions, *The "Duden"* [2008] 4 SLR(R) 984 and *The "Xanadu"* [1997] 3 SLR(R) 360 in support of its position that the time-bar condition should be imposed.

46 In my view, the two decisions submitted are not relevant in the present case. This is because *even if* the plaintiff *knew* about the charterparties before the time bar has apparently set in, the plaintiff's position is that the time bar does not apply in any event. The plaintiff takes the position that there is in fact no evidence to show that more than a year has elapsed since the cargo was completely discharged and delivered to third parties, given the mere bare assertions of delivery made in Rolf Zapffe's first affidavit. As pointed out by the plaintiff, the alleged delivery of the cargo to the

vessel, CMB Pamerol, is in contradiction with the sea-web searches conducted by the plaintiff that the said vessel does not even exist in the first place. The plaintiff highlighted the complete lack of evidence to show that the balance quantity of cargo (amounting to 1,078 MT of fuel oil) has been delivered, and hence the lack of indication of when the one year time bar period had begun to run. In addition, the plaintiff pointed out that the face of the bills of lading state that the cargo was intended for delivery to "bunkers for ocean-going vessels", as opposed to a *port*. Counsel argued that by a purposive reading of section 3(2) of the Singapore Carriage of Goods by Sea Act (Cap. 33) and section 1(3) of the Carriage of Goods by Sea Act 1971 of England, the time bar defence under Article III, rule 6 of the Hague-Visby Rules applies only to bills of lading where the intended carriage is *between ports*, which is not the situation in the present case. In other words, the plaintiff's position is that the time bar does not apply both in fact and in law. This is regardless of the plaintiff's knowledge of the existence of the two charterparties.

47 If the arbitral tribunal decides as a preliminary question that it has no jurisdiction, on the premise that no arbitration agreement has been concluded between the plaintiff and Oceanic, no issue of time bar arises and the plaintiff will have the chance to seek recourse from the courts. If the arbitral tribunal decides that it has jurisdiction to determine the dispute, the plaintiff can place the very same arguments before the arbitral tribunal for its consideration on why the time bar does not apply, both in fact and in law. It is not for the courts to pick and determine what issues should be placed before the arbitral tribunal by way of imposing conditions to a stay of court proceedings, where parties have already consented to refer their dispute to arbitration, and where the relevant issues fall within the scope of the arbitration agreement. This must be so if party autonomy is respected. It is not in dispute before me, neither is it submitted by counsel for the plaintiff, that the issue on whether Oceanic is entitled to rely on the time bar falls within the scope of the arbitration agreement. A party to an arbitration agreement will not be allowed a backdoor way of obviating the limited scope of the court's review of an arbitral award allowed under our arbitral framework, by cherry picking the issues which may be placed before the arbitral tribunal via a conditional stay of court proceedings. For these reasons, the time-bar condition is not allowed. I will add here parenthetically that whether the plaintiff had in fact known about the charterparties prior to when the time-bar had apparently set in appears to be a matter which may be further examined by questioning the relevant witnesses at the arbitral proceedings.

Conclusion

48 In the circumstances, the plaintiff's action against Oceanic is stayed pursuant to section 6 of the IAA in favour of arbitration at the Singapore Chamber of Maritime Arbitration, with the arrested vessel be retained as security in the satisfaction of any arbitral award given. I will hear parties on costs.

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