Singapore Academy of Law Judgment (Unreported and Reported)

The "Titan Unity" [2014] SGHCR 4

Suit No: Admiralty in Rem No 276 of 2012 (Summons No 3952 of 2013)

Decision Date: 4 February 2014

Court: High Court

Coram: Shaun Leong Li Shiong AR

Counsel: 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.

Subject Area / Catchwords

Arbitration – International Arbitration Act (Cap. 143A, 2002 Rev Ed) – Basis for a court to order a person to be joined to an arbitration – Whether parties to the arbitration agreement have consented to extend the agreement to a person who was not a party to the agreement but who accepts to be bound by it

4 February 2014 Judgment reserved.

Shaun Leong Li Shiong AR:

Introduction

1 The growing sophistication of international commercial transactions has led to the increasing incidence of complex disputes involving multiple parties and multiple contracts arising from a single commercial enterprise, with the traditional two-party dispute scenario fast becoming the exception rather than the norm. Consequently, international arbitration, as the leading mode of resolving international commercial disputes, increasingly finds itself faced with difficult and arguably as yet unresolved issues relating to joinder of third parties and consolidation of disputes.

2 It was decided in *The "Titan Unity"* [2013] SGHCR 28 ('*The "Titan Unity"*') that the applicable threshold to determine the *existence* of an arbitration agreement in order to invoke the 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") is that of a *prima facie* standard. As the court was satisfied that there exists an arbitration agreement between the plaintiff, ("Portigon") and the first defendant demise charterer ("Oceanic"), the action against Oceanic was stayed in favour of arbitration at the Singapore Chamber of Maritime Arbitration ("SCMA"). The present decision deals with the application made by the second defendant shipowner ("Singapore Tankers") to set aside and strike out Portigon's action, and the question of whether this court should order that Singapore Tankers be joined to the arbitration proceedings between Portigon and Oceanic.

Background

3 As the background to the dispute has been set out in *The "Titan Unity"* at [2] to [6], it would suffice for the purposes of the present decision to highlight the following facts.

4 Portigon provided financing to a company, 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 holder of bills of lading which acknowledges 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"), Portigon commenced a claim in misdelivery of cargo by filing an admiralty in rem action against both defendants on 26 July 2012.

5 As pleaded by Portigon in its statement of claim, the bills of lading contained a clear and unequivocal representation that Singapore Tankers was the contractual carrier of the cargo, because the master of the vessel (an employee of the manager of the vessel, Titan Ocean Pte Ltd) had stamped the bills of lading with the stamp of Singapore Tankers. Portigon claims that Oceanic and Singapore Tankers, both being the carriers and persons being in physical possession of the cargo, have failed to take reasonable care of the cargo, breached the contract of carriage, and converted the cargo by having delivered the cargo to third parties on 27 January 2012 without presentation of the bills of lading. Portigon claims the sum of US$3,687,485.90 which represents the invoice value of the cargo, for the direct loss arising from the defendants' breaches and/or conversion of the cargo.

6 Subsequent to the arrest of the vessel on 24 June 2013, Singapore Tankers applied to set aside and strike out the admiralty writ pursuant to O 12 r 7 and O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") respectively. The application also seeks in the alternative for the release of the vessel pursuant to O 70 r 12 of the Rules of Court.

7 Counsel for Singapore Tankers argued that the action should be set aside or struck out as the claim is time-barred pursuant to Article III rule 6 of the Hague-Visby Rules, which provides that:

... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

8 It was submitted that the Hague-Visby Rules is applicable to the bills of lading, and sought to rely on the time bar defence by submitting that no *competent suit* has been brought within 12 months of the alleged mis-delivery of the cargo. It was alleged that the cargo had been discharged by 2 February 2012, so that a competent suit must be brought by 2 February 2013. According to Singapore Tankers, "suit" for the purposes of Article III rule 6 of the Hague-Visby Rules must refer to a competent suit which was brought before the correct forum, and it was submitted that the suit against Singapore Tankers was not a competent one as it was brought in breach of the arbitration agreement between Portigon and Oceanic, where Portigon's action against Oceanic have been stayed in favour of arbitration.

9 Counsel for Portigon submitted, *inter alia*, that the time bar defence goes to the merits of the action and does not constitute a jurisdictional objection. It was further submitted that the Hague-Visby Rules do not in any event apply in the present case as a purposive interpretation of section 3(2) of the Carriage of Goods by Sea Act (Cap. 33) would show that the Hague-Visby Rules are applicable only to shipments between ports, which is not the situation in the present case. Counsel also submitted that that there is no indication of the date in which the alleged time bar would start from because there is no evidence of the actual date in which the delivery of the cargo had been completed.

My decision

Whether the writ should be set aside

10 Singapore Tankers stated the ground in support of the application on the face of its summons as follows:

The Plaintiff's claim is time-barred pursuant to Article III rule 6 of the Hague-Visby Rules because no competent suit has been brought within 12 months of the alleged mis-delivery of the cargo. The suit is not competent as to the merits of the Plaintiff's claim because it has been brought in breach of an arbitration agreement incorporated into the Bills of Lading sued upon.

11 Singapore Tankers is in effect attempting to avail itself of the benefit of the arbitration agreement between Portigon and Oceanic. Portigon's action against Oceanic has been stayed in favour of arbitration, and it would be up to the arbitral tribunal to decide whether the time bar under the Hague-Visby Rules is applicable. Assuming *arguendo* if the arbitral tribunal finds that Portigon's claim against Oceanic is time barred, that finding would not bar Portigon's claim against Singapore Tankers from proceeding *unless* the dispute between Portigon and Singapore Tankers was, just like the dispute between Portigon and Oceanic, part of the arbitration reference placed before the arbitral tribunal. As far as Singapore Tankers is concerned, even if Portigon had commenced arbitral proceedings against Oceanic and court proceedings against Singapore Tankers *within* 12 months of the alleged mis-delivery of cargo, Singapore Tankers' position would, based on the ground as stated in its summons,

still be the same, which is that the action brought by Portigon against Singapore Tankers is *not* a competent one as it has been brought in breach of the arbitration agreement between Portigon and Oceanic.

12 On this analysis, the true purport of the position taken by Singapore Tankers is that Portigon's claim in court should *properly* be the subject matter of the arbitral proceedings between Portigon and Oceanic such that the time bar under the Hague-Visby Rules applies. This is at best an argument analogous to the *forum non conveniens* scenario that the court should *not exercise* the jurisdiction *it has*, and is consequently not a jurisdictional objection which warrants the admiralty writ to be *set aside* under O 12 r 7 of the Rules of Court. It may however constitute a *substantive* objection to be placed for consideration under O 18 r 19 of the Rules of Court. As Singapore Tankers admits in the ground stated in the face of its summons, "[t]he suit is not competent *as to the merits* of the Plaintiff's claim because it has been brought in breach of [the] arbitration agreement" [emphasis added]. The distinction drawn by the court in *The "Bunga Melati 5"* [2011] 2 SLR 1017 between a jurisdictional challenge which properly belongs to an application brought under O 12 r 7, and a non-jurisdictional challenge which belongs to an application under O 18 r 19, is not disputed by counsel for Singapore Tankers.

13 There being no basis for a jurisdictional challenge under O 12 r 7, I move on to consider the application to strike out the writ under O 18 r 19.

Whether the writ should be struck out

14 As aforementioned, the true purport of the position taken by Singapore Tankers is that Portigon's claim in court should properly be the subject matter of the arbitral proceedings between Portigon and Oceanic such that the time bar under the Hague-Visby Rules applies. Counsel for Singapore Tankers relied upon the decision of the English Commercial Court in *Thyssen Inc v Calypso Shipping Corporation* SA [2000] 2 Lloyd's Rep 243 ("*Thyssen*") in support of this position. It was submitted that the decision, in particular the following pronouncements of Steel J (at [22]), is authority for the principle that an action which has been stayed in favour of arbitration will not constitute a "competent suit" for the purposes of Article III rule 6 of the Hague-Visby Rules:

...where, as here, the [court] suit is brought in breach of an arbitration clause, the Courts do not regard that as suit for the purposes of the rule [6 of the Hague-Visby Rules] (unless of course there is no application for a stay). ... It is not enough for the correct claimant to commence proceedings before a competent Court against the correct defendant. The proceeding must remain valid and effective at the time when the carrier seeks to rely on r. 6 in the second set of [arbitral] proceedings. Thus where the [court] action has been ... stayed by reason of the invocation of an arbitration clause, [the] suit has not been brought.

15 The decision however does not go very far in supporting Singapore Tankers' position. The court in *Thyssen* found that the claimant in an arbitration could not successfully prevent its arbitral claim from being time barred under Article III rule 6 of the Hague-Visby Rules from the mere fact that it had commenced court proceedings against the respondent-defendant within time. This was because the court action had been stayed in favour of arbitration with the result that arbitration proceedings were commenced against the respondent-defendant out of time. There were no pronouncements made by that court that a similar claim brought within time by the same plaintiff in court against a party who may be joined to the arbitral proceedings would as a result be rendered an "incompetent suit" and consequently be struck out.

16 In any event, taking the case put forth by Singapore Tankers at its best, *even if* the suit brought against Singapore Tankers is not a competent one *because* it was brought in breach of the arbitration agreement between Portigon and Oceanic, there is no authority submitted by Singapore Tankers to show why the *remedy* for such a situation would be to *strike out* the writ filed in court. Surely, such a remedy is inconsistent with the *staying* of court actions (as opposed to striking out) when the actions were found to have been brought in breach of arbitration agreements. In fact, it is implicit in Singapore Tankers' reliance on *Thyssen* that Portigon's claim against Singapore Tankers should, just like the claim against Oceanic, be *stayed* in favour of arbitration such that the time bar may be applicable, as opposed to it being struck out.

Whether the vessel should be released

17 Singapore Tankers applied in the alternative for the vessel to be released. It was alleged that counsel for Portigon had failed to disclose to the court which granted the arrest that the same law firm was acting for Portigon and the liquidators of Onsys. As Oceanic had time sub-chartered the vessel to Onsys, it would have documents which could evidence the existence of the time charterparty which contains the arbitration agreement under which the Hague-Visby time bar defence was applicable. It was also

alleged that Portigon should have disclosed the correspondence between Portigon and Onsys relating to the circumstances behind the misdelivery of the cargo as well as the vessel's chartering arrangements. Singapore Tankers also take the position that Portigon should have disclosed the fact that it did not request such further documents from Onsys' liquidators.

18 To my mind, the alleged non-disclosure is not relevant because it was undisputed that counsel for Portigon had disclosed to the court the time bar defence under the Hague-Visby Rules. The documents and correspondence exchanged between Portigon's and Oceanic's solicitors which set out Oceanic's position on the existence of the time charterparty and the time bar defence were disclosed, and counsel for Portigon had even made submissions at the hearing for the arrest of the vessel on why the action should not be stayed even assuming if the time charterparty did exist. Singapore Tankers did not specify what exactly were the correspondence between Portigon and Onsys which were undisclosed, nor the basis in which such documents can reasonably be assumed to exist. In addition, the alleged failure to disclose something which did not happen, or a non-event, appears to be quite an unusual ground for the application; it was not explained how the fact that Portigon did not request further documents from Onsys' liquidators would amount to a material fact which ought to be disclosed. The documents which Portigon failed to request were not specified, and it was not shown that such documents exists in the first place. In any event, the position taken by Singapore Tankers could longer be maintained given its own concession that there is no suggestion that the lawyers acting for Portigon would have access to the documents in the hands of the Onsys' liquidators, even if the lawyers acting for the latter are from the same firm (Magelssen's first affidavit at paragraph [20]).

Whether Singapore Tankers should be joined to the arbitral proceedings between Portigon and Oceanic

The basis for ordering a joinder

19 With the striking out and setting aside application dismissed, the court action against Singapore Tankers subsists alongside the arbitral proceedings between Portigon and Oceanic. As Portigon makes the same claims based on the same causes of action against both Oceanic and Singapore Tankers upon on the same set of factual matrix, efficiencies could be gained if the disputes are consolidated in a single adjudication setting, and this has the benefit of preventing inconsistent decisions. This presents an obvious issue of whether the court could on its own motion order that Singapore Tankers be joined to the arbitral proceedings. This court has on 12 November 2013 queried counsel on whether Singapore Tankers may be joined as a party to the arbitration proceedings in the event where Portigon's action against Oceanic is stayed in favour of arbitration. Counsel for Portigon highlighted the fact that Singapore Tankers did not seek a stay of the court action, and subsequently submitted that the Court of Appeal had in the recent decision in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2013] SGCA 57 ("*Astro*") emphasized that any notion of forced joinder would impinge upon party autonomy and confidentiality (see written submissions dated 4 December 2013 at [14]). Counsel for Singapore Tankers takes the position that *Astro* is not relevant to the present case.

20 The relevant question before the Court of Appeal in *Astro* was whether the arbitral tribunal had correctly construed rule 24(b) of the 2007 Singapore International Arbitration Centre Rules as a rule which parties have agreed to confer upon the tribunal the power to order parties who are not parties to the arbitration agreement to be joined to an existing arbitration reference. The Court of Appeal did not accept the arbitral tribunal's construction of the rule (at [181] and [188]) :

… A tribunal cannot extend its jurisdiction to disputes over which it has no jurisdiction by simply purporting to rely on r 24. To this extent we accept Mr Landau's argument that r 24(b) acts as a procedural power, rather than a means for a tribunal to extend its jurisdiction. It would otherwise be a portal through which a tribunal could exercise unlimited jurisdiction over any dispute which any non-party could have with the parties to the arbitration reference. We do not think that any set of arbitration rules, unless explicitly stated otherwise (and even then, we would reserve our views), could provide for such unlimited jurisdiction. The terms of any arbitration reference must ultimately lie within the limits described by the arbitration agreement, save to the extent that it might be extended with the explicit consent of all the parties. In our judgment, the general position must be that the arbitration agreement sets the parameters of the tribunal's jurisdiction. …

The forced joinder of non-parties is also a major derogation from the principle of party autonomy, which is of foundational importance because all arbitrations must proceed *in limine* from an agreement to arbitrate. Forced joinders carve out a significant exception to this by compelling an arbitration with other persons with whom the parties had not specifically agreed to arbitrate.

Even where these other persons are connected to the subject matter of the arbitration, there has been no election of arbitration as the specific dispute resolution mechanism with those other persons.

21 While the question of when a court may order a joinder was not placed before the Court of Appeal in *Astro*, the judicial philosophy on according due significance to the principle of party autonomy would apply with no less compelling force. As such, while a court may be acutely aware of the legitimate advantages and procedural efficiencies which would be gained with a forced joinder, it should nevertheless be borne in mind that these considerations in and of themselves do not provide the court with *the authority* to derogate from the principle of party autonomy in the absence of any express statutory provisions to the effect. Given that the IAA is silent on the issue of joinder, this court is guided by the spirit behind the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which is given the force of law via section 3 of the IAA. Section 4 of the IAA allows this court to refer to the *travaux préparatoires* when interpreting the Model Law, and it is that which I turn my attention to. The drafters considered the question of whether the Model Law should contain provisions relating to joinder (*Second Secretariat Note, Possible Features of a Model Law: Questions for Discussion, A/CN.9/WG.II/WP.35 (1 December 1981)*; H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 311 (2013) ("*Holtzmann & Neuhaus*")):

Should the model law deal with problems of consolidation in multi-party disputes (e.g. whether consolidation agreements should be given effect, or whether even without such agreements consolidation might be ordered)?

22 The drafters of the Model Law considered the question and took the following position (*First Working Group Report A/CN.9/216 (23 March 1982); Holtzmann & Neuhaus* at 312):

There was general agreement that the model law should not deal with problems of consolidation in multi-party disputes. *While it was agreed that parties had the freedom to conclude consolidation agreements if they so wished*, the Working Group was of the view that there was no real need to include a provision on consolidation in the model law.

[Emphasis added]

23 To the drafters, it was not necessary to provide any provisions because parties had the freedom to form their own agreements if they so wished to have a joinder (see Julian D M Lew QC, Loukas A Mistelis, Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), at para 16-47). In so far as the only premise in which a joinder will take place under the framework envisaged by the drafters of the Model Law is upon the agreement of parties; *consent* is, in the minds of the drafters, a *necessary condition* for there to be a joinder. This must necessarily be so, for if there does not exist an agreement to arbitrate, this could be a ground for refusal of recognition and enforcement under Art 36(1)(a)(i) (or section 31(2)(b) of the IAA and Art V(1)(a) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention")). In addition, where a party is joined without the consent of the parties, the resulting arbitral award could be refused recognition and enforcement for having dealt with a dispute not contemplated within the terms of the submissions to arbitration, under Art 36(1)(a)(iii) (or section 31(2)(d) of the IAA and Art V(1)(c) of the New York Convention). Where the composition of the arbitral tribunal is not in accordance with the agreement of the parties, including the party joined, the award given by a tribunal in which that party had no say in appointing may be refused recognition and enforcement, under Art 36(1)(a)(iv) (or section 31(2)(e) of the IAA and Art V(1)(d) of the New York Convention).

24 The rationale of the approach adopted by the drafters of the Model Law should be self-evident. Consent is the very foundation of arbitration, without which an arbitral tribunal's authority to hear and determine the dispute is non-existent. If a court orders a joinder notwithstanding the lack of consent, it would force a party to bring its dispute to be adjudicated by a forum which has no jurisdiction to decide the matter from which no enforceable award could be rendered. More fundamentally, the non-consenting party would be denied its right to access the courts when it has not waived its right to do so in the form of an arbitration agreement. As such, in adherence with the spirit of the Model Law and the New York Convention, a court has the power to order a joinder only with the parties' consent. The exercise of such power is a function of the basic requirement to recognize and give effect to arbitration agreements entrenched in section 6 of the IAA, Art 8 of the Model Law, and Art II(1) of the New York Convention, such that a party is joined to an arbitration pursuant to an agreement to arbitrate formed amongst parties (See generally Gary Born, *International Arbitration: Law and Practice Vol I* (Kluwer Law International, 2012), p 223). This is either where:

(a) the party sought to be joined is found to be a contracting party to the arbitration agreement; or

(b) parties to the arbitration agreement have consented to extend the agreement to a person who was not a party to the agreement but who accepts to be bound by it, with such consent forming an agreement to arbitrate.

25 For the latter situation, parties to the arbitration agreement may have agreed via the rules of the relevant arbitral institution to the procedural mechanism and criteria in which the consent will be given to join a person who is not a party to the arbitration agreement. In either event, consent is a necessary condition for a joinder, save perhaps for the unique situation where parties to the arbitration agreement have unequivocally agreed that one or all of the parties to the arbitration agreement need not consent to the joinder of persons who are not parties to the arbitration agreement (see e.g., Art 4 of the Swiss Rules of International Arbitration; and even then, the extent and nature of the precise agreement should be carefully examined to determine the true intention of the parties; see *Astro* at [181]).

The issue of joinder in the present case

26 As Singapore Tankers has taken the position that that it is *not* a party to the contract of carriage which incorporates the arbitration agreement, the proper analysis here would not be on how Singapore Tankers may be found to be a contracting party to an arbitration agreement (these relate to situations concerning incorporation of the arbitration agreement; the absence of separate corporate personality; or agency (See William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in *Multiple Party Actions in International Arbitration*, Oxford 2009) ("*William Park*")).

27 Instead, the issue in the present case is whether the parties to the arbitration agreement, i.e, Portigon and Oceanic, have consented to extend the agreement to Singapore Tankers, and whether it accepts to be bound by the arbitration agreement, thus forming an agreement to arbitrate amongst the parties. Counsel for Portigon takes the position that neither Portigon nor Singapore Tankers have consented to the joinder of Singapore Tankers to the arbitration between Portigon and Oceanic (see plaintiff's written submissions dated 4 December 2013 at [16]).

Determining if a person is a party to an agreement to arbitrate

28 Whether a person is a party to an agreement to arbitrate is a fact-intensive question which has to be determined in accordance with the law applicable to decide who are the persons mandated to have their disputes resolved by arbitration instead of the court process, i.e, the *lex arbitri* of the forum seized of the stay or joinder application. In this regard, both section 2A of the IAA and Art II(7) of the Model law provide a broad definition of an arbitration agreement 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"; and an arbitration agreement may be in the form of an arbitration clause or in a contract or in the form of a separate agreement, but an arbitration agreement shall be in writing. Reference should also be made to Art II(1) of the New York Convention, given that any joinder may have an impact on the enforceability of an award in other jurisdictions. That provision refers to "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration".

29 In line with the position adopted by the Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 ("*International Research Corp*"), which referred to the approach in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and & Construction Pte Ltd* [2008] 3 SLR(R) 1029, the court should have regard to the context and *objective circumstances* to ascertain the parties' *objective* intentions in determining the question of whether a person is a party to an agreement to arbitrate. The Court of Appeal in *International Research Corp* adopted this contextual approach to determine the question of whether a third person would be bound by an arbitration agreement found in a contract between two parties, where the third person had entered into a supplemental agreement with the two original contracting parties. On a contextual interpretation of the agreements, the Court of Appeal found that it was not the parties' intention for the arbitration agreement to be incorporated as part of the supplemental agreement, and the third person was accordingly not bound by the arbitration agreement.

30 It would also be useful to refer to international norms derived from cross-jurisdictional cases with similar factual matrix which may be instructive in determining whether a person is a party to an agreement to arbitrate for the purposes of ordering a joinder,

given the international character of the Model Law and New York Convention. In this regard, there are decisions which illustrate the court's willingness to determine from the parties' conduct and objective circumstances the true intentions of the parties, such as the case of *Southern Illinois Beverage v. Hansen Beverage Co.*, 2007 WL 3046273 (S.D. Ill. 2007), which involves an arbitration agreement in a principal distributorship contract for beverage distribution between the manufacturer and the principal distributor. There was no arbitration agreement in the sub-distributorship contract. The sub-distributor commenced a court action against the manufacturer for alleged sale of goods to third parties in breach of its obligations under the principal distributorship contract. The court found that the sub-distributor claimant could not obviate arbitration given that its claims were "fundamentally rooted in and dependent on [the] rights and conditions" of the principal contract, and that it could not disavow the arbitration agreement found in the principal contract given that it had sought to benefit directly under that contract. The court asserted the following principle:

… in the arbitration context, a party may be estopped from asserting that an arbitration clause contained in a particular document is inapplicable when that same party simultaneously claims the direct benefit of that contract. This estoppel doctrine exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.

31 Significantly, the court took the position that it would be manifestly inequitable to permit a plaintiff to both claim that a defendant is liable for its failure to perform contractual duties under an agreement containing an arbitration clause, and at the same time, seek to avoid arbitration of claims which fell clearly within the ambit of that arbitration clause.

32 Reference can also be made to the case of *Sunkist Soft Drinks v Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993). General Cinema Corporation ("GCC") had obtained the contractual right from Sunkist Growers Inc ("Sunkist") to market and sell the orange soda under the "Sunkist" brand name. GCC created a wholly owned subsidiary known as Sunkist Soft Drinks ("SSD") to produce and market the soda. Sunkist and SSD entered into a license agreement which provided a detailed framework for the marketing and sale of the soda, and the license agreement included an arbitration agreement. SSD was subsequently bought by a company, Del Monte Corporation ("Del Monte"). Sunkist commenced a court action against Del Monte for disputes arising from the license agreement. Del Monte sought to compel arbitration instead by relying on the arbitration agreement, but Sunkist argued that the dispute should not be arbitrated as Del Monte was not a party to the arbitration agreement. The court held that, even though Del Monte was not formally a party to the arbitration agreement, Sunkist was estopped from avoiding arbitration given that the basis of Del Monte's cause of action lies in the license agreement itself in which the arbitration agreement was found, and in view that SSD had practically lost its independent operating status and had become a part of Del Monte since SSD was bought.

33 *Fluor Daniel Intercontinental, Inc. v. General Electric Co., Inc*, No. 98-Civ. 7181 (WHP) 1999 WL 637236 (S.D.N.Y. 1999) is a case which involves supply and services agreements signed between two groups of companies to construct a power plant in Saudi Arabia. Some members of each group of companies concluded agreements which contained arbitration agreements, while other members of each group had not. The claimants deliberately chose to commence court proceedings against the members of the defendant group of companies which omitted to conclude agreements containing the arbitration agreements, alleging that the agreements had been induced through misrepresentations. The court ordered that the dispute be referred to arbitration, on the ground that the claimants was not allowed to "rely on the contract when it works to their advantage…but then repudiate the contract and its arbitration clause when they believe it works against them". The principle in this decision is described by a commentator as follows, "a signatory to an arbitration clause will be precluded from refusing to arbitrate with a non-signatory when the essence of the dispute is intertwined with, or derived from, the contract containing the arbitration clause" (*William Park* at para 1.49).

34 In *Société Alcatel Business Systems (ABS), Société Alcatel Micro Electronics (AME) et Société AGF v Amkor Technology et al, Cass 1e civ.*, Mar. 27, 2007, JCP [2007] I 168, No. 11, a Belgian company had contracted to purchase electronic chip components from an American corporation, which obtained its supplies from a Korean supplier. The contract between the Belgian company and the American corporation contained an arbitration agreement. On the request of the Belgian company, the Korean supplier would provide supplies to subsidiaries of the American corporation based in France as this arrangement was more convenient to the Belgian company. The company commenced a court action against the American corporation and its subsidiaries based in France for damages arising from defective chips. The *Cour de cassation* held that the subsidiaries of the American corporation could rely on the arbitration agreement; this was because the Belgian company had, by accepting the

subsidiaries into the supply arrangement, conferred upon them the benefit of the arbitration clause signed with their parent company, and at the same time, the subsidiaries have accepted to be bound by the arbitration agreement by accepting to partake in the supply arrangement (*William Park* at para 1.55).

35 The cases above illustrate the principle that where the objective circumstances and parties' conduct reveal that the parties to the arbitration agreement have consented to extend the agreement to a third person who is not a party to the agreement, and that third person has shown by its conduct to accept to be bound by the agreement, parties can be found to have impliedly consented to form an agreement to arbitrate where this has been clearly and unequivocally shown be the parties' objective intention. The concept of a *purely* implied agreement is however anathema to the requirement for a written arbitration agreement prescribed in the IAA, Model Law, and the New York Convention (as shown in the case of *Javor v Fusion-Crete*, Inc., XXIX Y.B. Com. Arb. P 596 (2004) (Sup. Ct. Brit. Col. 2003), where an arbitral award rendered against a party found to be an "alter ego" of a signatory to the arbitration agreement was refused enforcement under Art II(2) of the New York Convention for having failed to satisfy the requirement for a written arbitration agreement). As can be seen from the case decisions considered, this requirement necessitates there to be at least a *written* arbitration agreement from which parties' implied consent can be determined. In particular, implied consent is determined from the parties' intention to extend the written arbitration agreement to a non-party who accepts to be bound by it (see also the decision of the Swiss Federal Supreme Court in *X.S.A.L., Y.S.A.L. & A v. Z, SARL* (16 October 2003)).

Parties' objective intention in the present case

36 The facts of the present case are analogous to those in the cases discussed above. It appears that the parties in the present case have *impliedly* consented to have the dispute resolved before an arbitral tribunal. This court has in *The "Titan Unity"* found that there exists a written arbitration agreement between Portigon and Oceanic ("the arbitration agreement"). As alluded to above at [11] and [12], Singapore Tankers has by its own conduct accepted to be bound by the arbitration agreement, as it attempts to avail itself to the benefit of the arbitration agreement as well as the time bar applicable to the bills of lading which incorporates the arbitration agreement. While Portigon had disputed the existence of the arbitration agreement (see *The "Titan Unity"* at [7]), Oceanic has taken the same position as Singapore Tankers that the arbitration agreement did indeed exist. As for Portigon, it is evident that the very basis of its cause of action against Singapore Tankers lies in the contract in which the arbitration agreement is found. Portigon has by its own admission in its pleadings, always regarded Singapore Tankers as the contractual carrier as the bills of lading had carried the stamp of Singapore Tankers. This was, as pleaded by Portigon, a "clear and unequivocal representation" that Singapore Tankers *was the contractual carrier* under the bills of lading (see paragraph 6 of the statement of claim filed on 20 August 2013). In fact, Portigon claims *in the main* against Singapore Tankers that it was obligated to deliver the cargo in accordance with the contract of carriage contained in the bills of lading and had breached the contract by delivering the cargo without presentation of the bills of lading; the same claims were made against Oceanic *in the alternative* (see paragraphs [7] to [12] of the statement of claim filed on 20 August 2013). Given that Portigon is claiming against Singapore Tankers as the contractual carrier based on the contract of carriage contained in the bills of lading which incorporates the arbitration agreement mandating that any disputes arising out of the contract be resolved by arbitration, it would not lie in the mouth of Portigon to say that it did not consent to have its claim against Singapore Tankers arbitrated.

37 This is reinforced by the fact that Portigon had gone as far as to plead that Oceanic and Singapore Tankers are related companies controlled by one Tsoi Tin Chu and Tsoi's associates (see paragraph [6(f)] of the statement of claim filed on 20 August 2013]. Portigon submitted evidence to support this, by alleging that Tsoi is the sole director and shareholder of Oceanic, and that Singapore Tankers is a subsidiary of Titan Ocean (the managers of the vessel). The sole shareholder of Titan Ocean is, according to Portigon, a company which is owned by the Titan Group, where 40.9% shares of Titan Group is owned by Titan Oil. Tsoi and his wife, it was alleged, hold 100% of the shares in Titan Oil. In addition, Portigon presented further evidence which led it to conclude that "Singapore Tankers is nothing more than [an] investment vehicle nestled in this web of corporate entitled controlled by Tsoi" (see pages 34 and 35 of the plaintiff's written submissions dated 20 August 2013). Taking these allegations to their logical conclusion and in view that Portigon had proceeded with the same cause of action against both Singapore Tankers and Oceanic based on the same contractual obligations arising from the same contract in which the arbitration agreement is found, it would appear that Portigon's *objective* intention is to have the claim against Singapore Tankers arbitrated just as it did for the claim against Oceanic.

Express agreement on mechanism for joinder

38 Nevertheless, it is not insignificant that the parties to the arbitration agreement, Portigon and Oceanic, have expressly agreed upon a mechanism to join a person who is not a party to the arbitration agreement, under Rule 32.2 of the SCMA Rules, which reads as follows:

If the parties so agree, the Tribunal shall also have the power to add other parties (with their consent) to be joined in the arbitration and make a single Final Award determining all disputes between them.

39 In view that the parties have expressly agreed upon a mechanism in the arbitral rules to join a person who is not a party to the arbitration agreement, the court should defer any views it has on the parties' implied consent to joinder, to the arbitral tribunal's determination of its own jurisdiction pursuant to that mechanism. This must be so if party autonomy is to be respected, and this would also be consistent with the principle of *Kompetenz-Kompetenz* entrenched in Art 16 of the Model Law, which confers upon the arbitral tribunal the power to determine if it has jurisdiction to hear the claim brought by Portigon against Singapore Tankers. It could be that *express consent* is required under the mechanism agreed upon by parties to the arbitration agreement, in which case implied consent would in any event not be a justifiable criteria for this court to order a joinder, but that would remain a question which the arbitral tribunal has the prerogative to determine in its interpretation of what "consent" entails under Rule 32.2 of the SCMA Rules.

40 It could very well be that with this approach, a court would in practice seldom order a person to be joined to arbitral proceedings based on implied consent, given that many arbitral rules which arbitrants subscribe to provide mechanisms for joinder. This is especially so where the applicable arbitral rules provide for the requirement of *written consent* for joinder (see e.g., 1998 London Court of International Arbitration Rules ("LCIA rules"), Art 22.1(h)). The obvious difficulty with this approach in the present case is that the arbitral tribunal would have necessarily been appointed without the say of Singapore Tankers by the time in which a decision has been made by the tribunal on whether it should be joined to the arbitration. As alluded to at [23] above, this may have an effect on the enforceability of the award rendered. The concern is illustrated in the decision of *Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co.*, 119 J.D.I. (Clunet) 707 (French Cour de cassation civ Ire)(1992), where the French *Cour de cassation* set aside an award rendered by an arbitral tribunal which was constituted without the agreement of the respondents.

41 The difficulty highlighted is however not an intractable one. The right of an arbitrant to appoint its own arbitrator has been questioned (see e.g., Professor Jan Paulsson, *Moral Hazard in International Dispute Resolution*, TDM 2 (2011)) and has certainly be watered down in practice given the arbitrants' subscription to innovative rules of arbitral institutions, such as those which allow an arbitrant to consent to waive its right to appoint an arbitrator under prescribed circumstances (see Art 2.3 and 11.2 of the LCIA Rules). Where there is a single claimant but multiple respondents, there are rules which prescribe that the respondents shall jointly nominate an arbitrator, with the arbitrator being appointed by the arbitral institution if the respondents fail to do so (see International Chamber of Commerce Rules of Arbitration 2012, Art 12(6)). There are even rules which allow all parties to the arbitration to consent to waive their right to appoint an arbitral tribunal when a person is joined to an arbitration, such that the arbitral tribunal shall be appointed by the arbitral institution instead, and those which confer upon the arbitral institution the power to revoke the appointment of any arbitrators upon the addition of a party with the replacement tribunal appointed by the institution (see Hong Kong International Arbitration Centre Administered Arbitration Rules 2013, Art 27.11). In the present case, it could be that the person to be joined would be deemed to have agreed to the composition of the tribunal from the fact that it wishes to be joined notwithstanding the fact that an arbitral tribunal has already been appointed, but that is a question to be agreed amongst the arbitrants with the possible assistance of the arbitral tribunal and institution in the construction and administration of the SCMA Rules. It should ultimately be borne in mind that Art V(1)(d) of the New York Convention does not prescribe that the tribunal must be appointed by the arbitrants, but only that the composition of the arbitral tribunal be made in accordance with the agreement of the parties; and as modernised arbitral rules have more than capably shown, an arbitrant may *agree* to a tribunal's composition without having appointed it.

Conclusion

42 For the reasons provided above, the application to set aside and to strike out the writ is dismissed with costs. Parties will be heard on costs. I will give time for parties to consider whether they would like to have a joint discussion with a view to add Singapore Tankers as a party to the arbitral proceedings, as well as for Singapore Tankers to consider whether it wishes to be joined to the arbitral proceedings and if so, what necessary recourse it ought to seek before arbitral tribunal. For these purposes,

it would be good if counsel for parties have in mind the procedural efficiencies that may be gained with a joinder and the potential costs consequences that may result with concurrent court and arbitral proceedings without a joinder. Consequently, the time for Singapore Tankers to file and serve its defence is extended to 4 March 2014. Parties are to attend a pre-trial conference on a date to be fixed to update the court on the positions taken by parties.