Neutral Citation Number: [2021] EWHC 551 (Comm)

Case No: CL-2020-000577

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

CVLC THREE CARRIER CORP **CVLC FOUR CARRIER CORP**	**Claimants**
- and -	
ARAB MARITIME PETROLEUM TRANSPORT COMPANY	**Defendant**

- -
- -

Simon Rainey QC and Mr Gavin Geary (instructed by **Reed Smith LLP**) for the **Claimants**
Steven Berry QC and Mr David Walsh (instructed by **Lax & Co LLP**) for the **Defendant**

Hearing date: 26 February 2021
Draft sent to Parties: 03 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE COCKERILL DBE

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11 March 2021 at 10:00"

Mrs Justice Cockerill :

Introduction

1. This dispute, which is an appeal from an arbitration award under s. 69 of the Arbitration Act 1996, concerns the question of security for claims against a guarantor in the context of two bareboat charterparties and associated guarantees.

2. On 15 March 2019 CVLC Three Carrier Corp (CVLC3) chartered their vessel the M/T ANDRONIKOS (renamed 'ANBAR') to Al-Iraqia Shipping Services and Oil Trading (the 'Charterer'). This is the 'ANBAR Charterparty'. The same day, CVLC Four Carrier Corp (CVLC4) chartered a further vessel, the M/T AGITOS (renamed 'HILLAH') in the ownership of CVLC4, to the same Charterer (the 'HILLAH' Charterparty'). I will refer to CVLC3 and CVLC4 collectively as the 'Owners'. The Charterer is not a party to these proceedings or the underlying arbitration from which this appeal arises. The Charterparties are, for present purposes, functionally identical.

3. The Defendant, Arab Maritime Petroleum Transport Company (AMPTC), guaranteed the punctual performance of the Charterer's obligations in the ANBAR and HILLAH Charterparties to CVLC3 and CVLC4 respectively (the ANBAR and HILLAH Guarantees). AMPTC stands as the primary obligor under these Guarantees, not surety for the Charterer.

4. These Guarantees, were given as consideration by AMPTC to the Owners for entering into the Charterparties with the Charterer. Again the Guarantees are, for present purposes, functionally identical to each other. They provided as follows:

> "In consideration of you entering into the charterparty described herein, we, Arab Maritime Petroleum Transport Company ("AMPTC") hereby irrevocably, absolutely and unconditionally guarantee (as primary obligor and not merely as surety) due and punctual payment of hire which has accrued and is payable to CVLC Three Carrier Corp. (the "Owners") under the bareboat charterparty dated 15th March 2019 between the Owners, as owner and Al-lraqia Shipping Services and Oil Trading (AISSOT), as bareboat charterer (the "Bareboat Charterers") in respect of the vessel MT ANDRONIKOS with IMO number 9830812.
>
> In the event that Bareboat Charterers default in their hire payment obligations in respect of hire which is from time to time due and payable to Owners by reference to the respective charterparty terms and conditions and provided Bareboat Charterers' default in such payment obligations continues for a period of no less than 30 calendar days, Owner has the right to call upon this guarantee by notifying us of Bareboat Charterers' default and request payment of outstanding hire which has accrued and is due and payable to Owners, payment of such hire to be made immediately by us to the bank account stipulated in Box 26 of the foregoing charterparty.

> Our obligations under this guarantee will not be discharged, impaired or otherwise affected by reason of the giving of any time, waiver, forbearance or other indulgence to Bareboat Charterers under the charterparty and/or to any other person or by any variation of or amendment or supplement made to the charterparty or by any act, omission, which could or might otherwise impair or diminish, or discharge or release us from all or part of our obligations under this guarantee.
>
> We also irrevocably, absolutely, and unconditionally guarantee, as primary obligor and not merely as surety, the due and punctual performance of any and all other obligations of the bareboat charterer under the said charterparty. …"

5. The Guarantees were not on standard forms. However, as appears from this recital, their terms were such as would be familiar to anyone with a working knowledge of guarantees; their drafting was largely composed of "boilerplate" text.

6. On 24 December 2019 the Owners served notice on the Charterer terminating the Charterparties because of alleged breaches by the Charterer. This was followed, on 22 March 2020, by the Owners putting AMPTC on notice they had referred the disputes with the Charterer to arbitration and would be making demands on the ANBAR and HILLAH Guarantees.

7. On 25 June 2020 the Owners served notices of arbitration on AMPTC. They contended they had suffered loss and damage because of the Charterer's breaches of the Charterparties, and that AMPTC was liable under the associated Guarantees. A Tribunal of three people, one of whom was the well-known LMAA arbitrator, Mr Mark Hamsher, was appointed in the charterparty disputes. On 29 June 2020 Mr Hamsher was then appointed sole arbitrator with jurisdiction over the Guarantees claims.

8. On 16 July 2020 AMPTC confirmed it would not seek to rely on any defences additional to those advanced by the Charterer in the arbitration between the Owners and the Charterer.

9. On 31 July 2020 the Owners filed an application in the Provincial Court of Luanda, Angola, seeking the arrest of AMPTC's vessel ALBURAQ as security for their claims under the Guarantees. On 3 August 2020 the Angolan court issued an interim order for the detention of the vessel, and on 11 August 2020 handed down a judgment ordering arrest of the vessel.

10. In the meantime, on 5 August 2020 AMPTC had applied to the arbitrator for a declaration that:

> "It is an implied term of the Letters of Guarantee dated 15 March 2019 ('LoGs') between AMPTC and the Claimant Owners of the ANBAR and HILLAH that the Owners would not seek additional security in respect of the matters covered by the LoGs".

11. On 13 August 2020 Mr Hamsher, on application by AMPTC, issued an award making a declaration in these terms and awarding interest and costs in favour of AMPTC (the 'First Award'). This was clarified and supplemented by a second award, dated 19 August 2020 (the 'Supplementary Award') which declared the Owners in breach of the implied terms, and liable to AMPTC for damages to be assessed.

12. I shall consider the First Award in some detail below, but the scheme of it was as follows:

    i) At [14] the Arbitrator noted that he could not make any determination as to the propriety of the arrest;

    ii) At [15] he noted that "*in view of the urgency of the matter, …there was no opportunity for evidence to be adduced or challenged. It followed that I could not make any findings of fact.*" And recited various issues where there were disputes as to facts, including the question of whether AISSOT was a subsidiary of AMPTC;

    iii) At [18-19] he dismissed arguments as to the absence of reported cases dealing with such a term, and the absence of specific wording;

    iv) At [20] he dismissed the relevance of certain other terms relied on by Owners;

    v) He identified at [22-23] what he saw as two distinguishing features of the guarantees:

> "Firstly, liabilities under the letters of guarantee could only be triggered if it had been established that AISSOT had failed properly to perform the relevant bareboat charterparties.
>
> Secondly, although AMPTC were potentially liable as primary obligors and not merely as a surety under the letters of guarantee, those letters of guarantee were, at the risk of stating the obvious, both identified and correctly categorised as letters of guarantee that were being provided in consideration of the agreement of the bareboat charterparties."

    vi) From that he inferred that the Guarantees must have been considered adequate security at the time the Charterparties were formed, because otherwise they would not have been concluded.

    vii) At [24] he noted that breach would not have been in the minds of the parties when agreeing the Guarantees and stated:

> "For the Owners to be entitled to enforce the rights under the letters of guarantee, however independent of the bareboat charterparties they might be, would have required both an established failure by AISSOT to perform their obligations under the bareboat charterparties and an established failure by AMPTC to perform their obligations under the letters of guarantee."

viii) At [26] he said that were the Owners' position correct, they would be entitled to seek additional security even if there was no breach of either Charterparty.

ix) At [27] he concluded that:

> "I do not think that objectively the parties would have assumed that there would be an entitlement to obtain further security and, conversely, business necessity requires the prohibition on acquiring further security."

13. By an application to this court dated 8 September 2020 the Owners sought to appeal the First and Supplementary Awards of the arbitrator pursuant to section 69 Arbitration Act 1996. In the Claim Form the questions of law were identified by the Owners as:

> "Is there to be implied into contracts of guarantee and indemnity which guarantee the performance of another contract an implied term that the creditors would not seek security over and above that provided by the contracts of guarantee and indemnity?
>
> If so, are creditors in breach of such implied term by arresting assets of the guarantor after the guarantor is, or is alleged to be, in breach of the contract of guarantee and indemnity?"

14. An issue was taken by AMPTC as to whether the question of law was one which the arbitrator was asked to determine. It also took issue both with the questions of public importance and the merits threshold.

15. On 24 November 2020 permission to appeal was granted by me, having considered detailed skeleton arguments lodged by both sides. In granting permission I said as follows:

> "It appears that there may be a mismatch between the points which the Arbitrator was asked to consider originally and the point which he ultimately had to consider owing to the exigences of circumstances and the contracted timetable applied.
> Paragraph 11 of the Award sets out the question which was asked originally. That is a question about implication of a term into these particular guarantees. The answer to that question would be one of mixed law and fact, but with a considerable factual component.
> As can be seen from paragraph 3 of the message quoted at paragraph 11, a number of specific factual points were relied upon as relevant to that question. However as can then be seen from paragraph 15 of the Award there was no opportunity for evidence to be adduced or challenged and the Arbitrator could not make any findings of fact. ...
> It follows that the question which the Arbitrator was ultimately asked to answer was not the question set out in paragraph 11 of the Award, but another question which is never quite defined. It would appear to be a hybrid between the question which the applicants say was asked, which is a pure question of law said to be applicable to guarantees generically, and the question originally posed (following the stripping out of all controversial factual matters).

> It appears to be best seen as a question of whether such a term will fall to be implied where a guarantee has no express wording providing for further security and is expressed to be given "*in consideration of you entering into the charterparty*".
> The term sought to be implied is also not properly reflected in the question identified in that AMPTC does not seek to imply such a term which responds absent an arguable breach of the guarantee.
> Therefore (i) I do not accept the submission that the question asked was as submitted by Respondents (ii) the question identified for the purposes of appeal is also not the one asked of the Arbitrator. However I do accept that a question of law akin to that identified can be identified and was asked."

16. Permission was therefore given in respect of a reformulated question:

> "Is there to be implied into contracts of guarantee and indemnity which (i) guarantee the performance of another contract and (ii) are expressly given in consideration of the beneficiary entering into that other contract, an implied term that the creditors would not seek security over and above that provided by the contracts of guarantee and indemnity where the guarantor is, or is alleged to be, in breach of the contract of guarantee and indemnity?"

The Submissions in Outline

17. The Owners submit that:

i) The Guarantees are independent contracts to the Charterparties, and that AMPTC is a primary obligor.

ii) AMPTC were (at least arguably) in breach of the Guarantees on the date the Owners terminated the Charterparties following the Charterer's repudiatory breach (i.e. around 24 December 2019 at the latest), because an action on a guarantee of this sort arises on breach by the party whose conduct is guaranteed.

iii) A breach does not have to be "established" for a guarantor to be liable – that is an issue for the final hearing, at which a breach may or may not be confirmed as having already happened.

iv) On breach, the rights thus triggered include the usual right to seek security in respect of the alleged breach. To be unable to obtain security for claims under the Guarantees would undermine the value of the Guarantees.

v) The arbitrator assumed AMPTC were not in breach because the Charterer's breaches had not been established, but he should have assumed, when considering the potential implication of terms, a situation where AMPTC were in breach of the Guarantees.

vi) If he had, the answer to whether restrictions on security for the obligations under the Guarantees were necessary for business efficacy (a high bar) could only have been no.

18. AMPTC's case is that:

    i) The appeal concerns a question the arbitrator was never asked to determine: the only question he determined was whether on the facts of these Guarantees they included an implied term that the Owners would not seek additional security. As such, permission should not have been given;

    ii) Alternatively, the arbitrator answered the question correctly, and it was necessary to imply a term limiting security on the Guarantees. He applied the correct legal test. In particular:

        a) The Owners essentially seek security on security – an outcome that is uncommercial and improbable.

        b) The Guarantees were themselves adequate security, and were relied on by the Owners when entering into the Charterparties.

        c) The Court should be slow to interfere with the judgment of an experienced arbitrator.

    iii) In the further alternative, AMPTC submitted that the matter should be remitted to the arbitrator to interpret the contract after hearing evidence as to the factual matrix known to both parties – for example the relationship between the Charterer and AMPTC, or that AMPTC was owned by the governments of a number of Arab nations.

19. In oral argument AMPTC concentrated fire on the jurisdictional question and within the substantive question on the importance of respecting the value judgment of an experienced arbitrator, submitting that the decision was based on factual findings which could not be challenged. It also argued that commercial common sense favoured that approach where both contracts related to the same underlying obligation.

The Approach to Arbitration Appeals

20. Although the usual authorities as to the correct approach to appeals from arbitration awards were not specifically cited on the substantive application, they were mentioned in relation to permission, and I of course bear them very much in mind. In particular I bear in mind the well-known quote from *Kershaw Mechanical Services Limited v Kendrick Construction Limited* [2006] EWHC 727 (TCC), [57].

21. I also bear in mind the citation from Ambrose, Maxwell and Collett *London Maritime Arbitration* (4th Ed) at paragraph 22.14 cited in the Respondent's permission skeleton and orally before me:

> "Questions as to the proper construction of a contract (or the existence of a contractual obligation) are treated as pure questions of law. However, often these questions are fact specific, for example whether a term is to be implied as a matter of business efficacy, and will depend on the relevant factual matrix, including market practice and what was reasonably known to the parties. If the question is highly fact specific a

> judge may be more likely to give weight to the tribunal's market experience and will only reverse the decision if satisfied that the tribunal has come to the wrong answer. In practice this means that in highly fact specific questions of construction the court will be more likely to refuse permission to appeal on grounds that the tribunal was not obviously wrong."

22. This passage is of relevance to both issues which were live before me.

23. I should note one further point. This case is an unusual instance of an arbitration appeal where the judge granting permission also hears the substantive application. That situation is avoided where possible because while permission decisions create no estoppel (even where the judge granting permission has expressed the view that the decision is obviously wrong), it can be uncomfortable for a party who was opposed to permission for the same judge to hear the substantive application.

24. Circumstances have required me to hear the application, and that was possible because I had only expressed the view on permission that the lower of the two merits hurdles (open to serious doubt) was surmounted. Mr Berry QC sensibly took no point on this. Further with his skilful argument deployed at the hearing there could be no doubt that all the points which might not have conveyed themselves to me on the merits of AMPTC's case at the permission stage were clearly and persuasively made.

Discussion

The question of law

25. A subsidiary issue between the parties has been created by the approach which I took to the question of law. I recast the issue of law in the way I have already outlined; in part to reflect the fact that the exigencies of the situation meant that the arbitrator had to proceed without full factual matrix evidence, and in part to deal with the fact that the issue as drafted only raised the question of breach (key to Owners' submissions) in the second question.

26. I note here that the recasting of questions of law is by no means unheard of by judges considering applications for permission.

27. What is now said for the Respondent (as tactfully as possible) is that I erred in so doing and/or that as a result the question posed is not one which was posed to the arbitrator, and permission should therefore never have been given.

28. Despite the ingenuity of the argument I am not persuaded that it has any substance.

29. The first question is the extent to which this argument is open to AMPTC. I was referred to two authorities. The Owners favoured the judgment of HHJ Waksman in *Agile Holdings v Essar (*"*The Maria*"*)* [2018] EWHC 1055 (Comm). He concluded that:

> "There are strong policy reasons in my judgment for making the decision to grant leave as efficacious and immune from further consideration as possible.

> 29. First, the exercise undertaken by the Judge considering permission is not, and is not meant to be, a simple and sometimes brief overview of the case to answer a broad question-"is there an arguable case?" Or "is there a real prospect of a successful appeal?" It involves a more detailed consideration of a number of separate threshold questions. It can, at least in my experience, take a significant amount of time.
>
> 30. Second, the route to appeal under s69 is a very narrow one, deliberately so in deference to the interest in the finality of arbitral awards. But once a case has successfully navigated that route then it seems to me that there is every reason to move onto the merits of the question of law posed without the distraction of tangential points which have already been decided."

30. He went on to make some observations including:

> "(1) It is impossible to see how the issues about public importance, affecting the rights of the parties and justice and convenience can ever be raised on the appeal once leave has been granted;
>
> (2) The Law Question and the Determination Question are in a different category but in my view the appeal court should at the very least give considerable weight to the decision by the Judge granting permission on those points;
>
> (3) That weight increases where (a) the decision was made not merely on paper but after an oral hearing and/or (b) the materials before the Judge granting permission were the same or substantially the same as those before the appeal court …. If both of those factors are present, then very considerable weight should be given to the original decision;
>
> (4) Because, analytically, the Law Question might more genuinely arise out of a consideration on appeal of the tribunal's reasoning and decision, there might be somewhat more leeway to reconsider it on appeal ..."

31. AMPTC drew my attention rather to the case of *Bunge v Kyla* [2013] EWCA Civ 734. That was the case where a challenge was made to the decision of Flaux J refusing permission to the Court of Appeal that a case was not of general public importance, on the grounds that at the permission stage Hamblen J had granted permission on the basis that it was of general public importance. The Court of Appeal held that:

> "To say either that [Flaux J] was bound by the preliminary decision of Hamblen J on the question of general importance or that he was not entitled to depart from it without giving more reasons than he did borders on the nonsensical. By the time he refused permission to appeal he knew far more about the case

> than Hamblen J could have known when he dealt with the matter on the papers."

32. Mr Berry contended that this demonstrated that even the question of general public importance could therefore be revisited.

33. Mr Berry's overarching submission, that the judge's decision on all matters at the permission stage is provisional and can be revisited at the main hearing with the benefit of the "Socratic dialogue" provided by oral argument is a novel one, and one which is not reflected in the way in which appeals have been conducted in this Court for the last 25 years.

34. I am satisfied that HHJ Waksman QC was correct in the *Agile Holdings* case and that the permission stage is intended to be a qualifying hurdle which is not revisited and that, while it may not be impossible to revisit the various component parts of the permission decision, there will have to be highly unusual circumstances justifying this course. Were the course which Mr Berry urges to be adopted, appeals would become much longer and more expensive, with all or most of the questions being relitigated in written and oral argument. This would be consistent neither with the policy of the 1996 Act, nor with the overriding objective.

35. If that approach is correct there was no reason to suppose that there were such highly unusual circumstances. Further even if, as Mr Berry submitted by way of a variation on his theme, this is a case where I should simply give weight to my previous view that the question was one which was referred to the arbitrator, no submission was actually made that that weight was overbalanced by the arguments now deployed. In essence therefore the argument run at this stage could only even get off the ground if the issues on the permission application were capable of entirely fresh consideration in the appeal. I am perfectly satisfied that this is not the correct approach. Even if it were, I would unhesitatingly reach the conclusion that the question of law did pass the relevant hurdle.

36. The question on appeal has to be one arising out of the award and it has to be one which the arbitrator was asked to determine. However it is not the case that the question must have been asked in exactly the form in which it is now posed. Were that the case almost no applications for permission would succeed. What is necessary is that the question of law is inherent in the issues for decision by the tribunal. It is often necessary to strip away the accretions of case specific drafting to arrive at the real issue of law. And a question of law need not be a pure question of law. It is well established – as the passage from Ambrose, Maxwell and Collett makes clear - that questions of construction can qualify.

37. The question of law in respect of which permission was originally sought was:

> "(1) Is there to be implied into contracts of guarantee and indemnity which guarantee the performance of another contract an implied term that the creditors would not seek security over and above that provided by the contracts of guarantee and indemnity.

> (b) If so, are creditors in breach of such term by arresting assets of the guarantor after the guarantor is, or is alleged to be, in breach of the contract of guarantee and indemnity?"

38. Paragraph 11 of the Award which lists the declarations sought thereby effectively sets out the question(s) which were asked originally in the arbitration.

> "a. [Is it] an implied term of the Letters of Guarantee dated 15 March 2019 ('LoGs') between AMPTC and the Claimant Owners of the ANBAR and HILLAH that the Owners would not seek additional security in respect of the matters covered by the LoGs;
>
> b. [Are] The Owners are in breach of that implied term in taking steps to arrest and arresting the AMPTC vessel ALBURAQ in Angola[?]"

39. There is plainly a disjunction between the two sets of questions. The question in the arbitration was presented as a question about implication of a term into these particular guarantees. The answer to that question would be one of mixed law and fact, but (as I noted when giving permission) with a considerable factual component, because the pleading went on to set out a number of "*objective circumstances in which the BBCPs and the LoGs were agreed and the LoGs were provided by AMPTC as the consideration for the Owners entering the BBCPs, as known to all parties*".

40. Pausing here, the original question of law was met with an argument that it was not the question asked on the basis that "*The Owners seek to appeal on a point of law about a generally legally implied term. The actual decision was about a term implied on the facts on grounds of business necessity. These are different kinds of implied term*."

41. While I agreed that the question as formulated was not the one asked, when considering permission I did not agree with this argument. As my reasons made clear, two aspects of the question troubled me. The first was the inclusion of the question of the underlying factual scenario of arguable breach. That was plainly part of the scenario which the arbitrator was asked to deal with, although it formed no part of the formulation of the question. The second aspect which troubled me was whether the question as originally posed had such a specific factual basis that it could not be a point of law of general public importance (see the passage from Ambrose, Maxwell and Collett above).

42. While the pleaded issue was a legal/factual one with a very considerable factual aspect, it is plain from the Arbitrator's award that material which arose for consideration in dealing with the question was ultimately circumscribed by the exchanges which followed, in particular as to factual matrix. So one sees at [15]:

> "There was no opportunity for evidence to be adduced or challenged. It followed that I could not make any findings of fact. For instance, Reed Smith objected to an assertion that the letters of guarantee were a "parent company guarantee", saying that there was no evidence that AISSOT were a subsidiary of AMPTC. I accepted that I could not assume that AISSOT were a subsidiary of AMPTC just because that was a reasonable inference. Similarly, I accepted the validity of Reed Smith's

> protests that it had not been established that at the time of the conclusion of the letters of guarantee the Owners of the two vessels knew that AMPTC was owned by the governments of a number of Arab nations and owned a fleet of tankers (as suggested in paragraph 3b of the email of 71h August from Lax & Co. set out in paragraph 11 above). Similarly, in the absence of any evidence, I did not consider that any findings could be made about what the attitude of the parties would have been if the Owners had asked for a bank guarantee or if AMPTC had asked that the letters of guarantee include an express prohibition on the obtaining of further security."

43. When one compares this to the pleaded case (striking through the factual matrix that was not available) the effect becomes apparent:

> "3. …
>
> a. Capital and Owners wanted security for Aissot's performance of the BBCPs over and above Aissot's own covenant.
>
> ~~b. AMPTC was (and remains) owned by the governments of a number of Arab nations and own a fleet of tankers.~~
>
> ~~c. AMPTC was acceptable to Capital and the Owners as the guarantor of Aissot's performance instead of the obvious alternatives of cash security or bank guarantees.~~
>
> ~~d. Aissot and AMPTC would not have provided security by way of cash or bank guarantees and, if that had been asked for, the BBCPs (and thus the LoGs) would not have been made~~."

44. I therefore remain of the view that events somewhat overtook the pleading. AMPTC suggests that "*the Arbitrator was never asked by either party to determine any question other than that identified in paragraph 11 of the First Award*". In one sense that is true; but the fact that those factual points were in issue, and were not capable of being decided in the expedited hearing was apparent to both parties once Owners had objected that they were not common ground. AMPTC did not object to the Arbitrator proceeding without considering those factual points. As such, the arbitrator was ultimately tacitly asked - or at least left to - make the decision on an implied term based on very little by way of factual matrix.

45. The result therefore is that the question for decision was as to a term implied on facts, but those facts could not be said to be case specific. The backdrop was essentially: (i) a guarantee being required, (ii) wording which was not a standard form but was composed of many very standard phrases used in guarantees (iii) arguable breach (iv) arrest. The consequence is, as I said in my reasons, that while the legal question originally posed was not the question asked, the actual question asked, in the context of the lack of specific factual matrix, equated very closely to that more generic question. It was not a term to be implied at law, but a term to be implied based on generic facts.

46. It follows that the question as reformulated was put to the arbitrator.

47. One might equally say that however the question is capable of being formulated, in reality the more macro question of whether there was an implied term on business necessity principles was the one before the arbitrator. Both parties indeed agreed on that.

48. That question is a question of mixed law and fact capable of being appealed. In the circumstances of this case the essence of the issue for the Arbitrator was (as both questions identify and as the First Award makes clear) whether such a term will fall to be implied in a case of arguable breach where a guarantee (i) has no express wording providing for further security and (ii) is expressed to be given "*in consideration of you entering into the charterparty*". That raises issues of sufficiently general application that permission on the basis of the lower hurdle was appropriate.

49. It follows that despite Mr Berry's best efforts, the attempt to knock the appeal out at the first hurdle fails.

Was the decision of the Arbitrator correct?

50. I reach the clear view that the Arbitrator was not correct.

51. The starting point for this is quite simple. The legal hurdle for implication of a term is a high one. It is perhaps to be borne in mind that the question of the correct test for implication of terms has not been entirely static over the last 30 years, and that the current situation involves the application of a test which is pitched somewhat higher than it used to be, for example in the era of *Belize Telecom.*

52. At present the test of necessity is once again just that. It is not a test of "absolute necessity" but it is a test of necessity. One sees this in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 (relied on by AMPTC):

> "a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, … although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. …if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, …, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can

> only be implied if, without the term, the contract would lack commercial or practical coherence."

53. One sees it also in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UK PC 2:

> "A term is to be implied only if it is necessary to make the contract work and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion"

54. Putting that test against the fairly generic facts of this case raises an immediate question. Most implied terms are ones which fall to be implied on the specific facts of the case. But this cannot be said here. This is not about a unique contract. It is not about a unique type of contract. It is about a guarantee couched in "boilerplate" terms. What the arbitrator is therefore saying is in effect that many guarantees will contain this implied term, even though the parties have not chosen to write it down.

55. That question only becomes more troubling when one adds into the equation the fact that in normal circumstances a party entering into a contract is not circumscribed as to the steps it can take to secure its claim in the event of an arguable default. The implied term in this case is therefore in the nature of an exclusion clause. There is of course a good deal of law which establishes that a court will generally require clear words before it will conclude that a contract has taken away the common law rights or remedies of one of the parties – see for example the authorities cited at Lewison *The Interpretation of Contracts* (7th ed) paras 12.144-5.

56. Moving on from these preliminary features it is necessary to examine the Award. The first question is whether the arbitrator addressed the right legal question. That he did so is unfortunately not entirely clear. The Award does not cite any authority and does not make clear that the more recent authorities, and the rigour which they encapsulate, were well in mind. While it is true to say that there are some passing indications that the Arbitrator did have the correct test in mind, in that the Arbitrator questioned in terms in the First Award whether "*business necessity requires prohibition on acquiring further security*" [25] and the same words also appear in [20]: "*in considering whether business necessity required a prohibition on obtaining additional security…*", the test is never specifically referenced.

57. What is noticeable is that none of the indicia within the authorities (of necessity not being watered down, the officious bystander test or of commercial or practical incoherence) are considered. There therefore appears to be room for doubt that the arbitrator had the correct test really present to his mind. I do not however need to come to a conclusion on this point; in any event, even if it were clear that the arbitrator had the correct test in mind, that can be no answer if on analysis he has not applied it.

58. In truth AMPTC struggled to say that the correct approach had been adopted, and its discomfort with the analysis in the Award was evidenced by the emphasis which was placed on the preliminary (jurisdictional) point and the shift between the arguments advanced in writing and orally.

59. At the heart of AMPTC's argument is the contention that it makes no sense for the Owners to be entitled to two sets of security "*that would respond in the event of charterers' breach*". This is a point repeated at paragraph 5 of the skeleton. But this characterisation of the position as "double security" mistakes the position.

60. The starting point is the position absent a guarantee; in those circumstances there would be a right to seek security against the Charterer. Adding the Guarantee adds a different dimension. As regards the contract with the Charterer there are not two sets of external security which respond in the event of Charterer's breach; there is the Guarantee, and there remains the right independently to seek security for the claims against the Charterer. As regards the Guarantees, they create a separate contractual relationship to that between Owners and the Charterer. The Guarantees may be called on according to their terms if there is an arguable breach by the Charterer. However there only becomes a right to seek security against AMPTC if they do not respond under the Guarantees, and that security is security for the breach of AMPTC's obligation, not for breach by the Charterer.

61. In truth while this point was relied upon as a "commercial common sense" point in favour of the Arbitrator's approach, if commercial common sense is to be invoked by reference to the security position under the Charterparties, it is rather more apposite to say that it would make no sense to be able to seek security (e.g. by way of arrest) for the Charterer's breach of its obligation, but not to be able to seek similar security for AMPTC's breach of their own primary obligation.

62. Although Mr Berry attempted to suggest that it was artificial to distinguish between the two contracts in that both promised the same thing (both promises are in substance security for performance of the bareboat charter) that argument was hard to maintain, in circumstances where (i) the sole security of Charterer was not adequate to enable agreement of the charter and (ii) the logical correlate of that would be that the same position as to security ought to pertain for both contracts; and it could not sensibly be suggested that there ought to be no right to seek security in respect of the Charterer.

63. I turn now to the argument at paragraph 26 of the skeleton:

> "The Guarantees were 'security'. The Claimants had the security they contracted for. They were secure. It is contrary to commercial common sense that they can get security for the security which they agreed was adequate. The question can be tested by asking the logically identical question, whether they would be entitled to get security for the security for the security by arresting Club assets. Of course not."

64. It is hard to see the force of this point (and indeed it probably shades into the issue of breach); one can never obtain further security unless the guarantor or the P&I club has arguably defaulted on the guarantee. But there is no reason of principle why such security would not be available. Here I suspect that the practicalities obscure the logic;

it may well be true that one would not seek security against a P&I Club; but that would not be because one could not (subject to the relevant legal and procedural hurdles for the relevant form of security in the relevant forum). It is because it would be rare to feel it was necessary. The same practical context applies, albeit with somewhat less force, to guarantors; it may well be rare that the financial position of a guarantor is such that it is considered necessary or worth the time, effort and costs to seek security. But that is a matter entirely separate from legal principle.

65. In writing AMPTC rested heavily on the Arbitrator's treatment of the "*in consideration for*" provision. That argument, that the reference to the "consideration" wording was enough to justify the Arbitrator's conclusion, cannot be sustained.

66. The arbitrator held that the "*letters of guarantee were…both identified and correctly categorised as letters of guarantee that were being provided in consideration of the agreement of the bareboat charterparties*" and that the "*obvious inference to be drawn from the conclusion of the other contracts is that the letters of guarantee must have been considered to provide adequate security because otherwise the contracts would not have been concluded*" [23].

67. AMPTC supported this reasoning, which it described as "cogent, coherent and correct", saying "*That inference must be well-founded because if the security embodied in the Guarantees was insufficient, the Charterparties would not have been agreed.*"

68. I cannot begin to accept AMPTC's characterisation of this reasoning. The starting point is that this "*in consideration*" wording is hardly unique or significant wording. On the contrary it is again "boilerplate" found in many contracts, and particularly in many guarantees. Consequently it is hard to see what the magic of the wording is, or that it should be taken to mean something with such a significant result. I cannot see why those words should be taken to convey or connote anything about the way in which the beneficiary may claim against the guarantor when the guarantor is or may be in breach.

69. As for the inference, with respect to the Arbitrator and to AMPTC, this is an entirely circular argument. The contracts with the Charterer were concluded because the letters of guarantee were sufficient security in respect of the Charterer's obligations. That does not provide an answer to whether security was contemplated *vis a vis* the guarantor AMPTC. When the Arbitrator concludes the inference is that there was adequate security simply in the guarantee itself it begs the question of: adequate security for what? The obvious answer on the face of the document is that it is security for the obligations of the person with whom Owners are now willing to contract, and not for the promise of AMPTC to behave properly as the guarantor.

70. Also circular is the argument originally deployed at paragraph 26.2 of the permission skeleton and revived at paragraph 23.6-7 of the skeleton for this hearing:

> "the Claimants say that they should have the "ordinary right of any claimant to enforce claims…including the ordinary right to secure those claims by arrest"
>
> ….

> However, this conflates two issues: (i) rights of enforcement; and (ii) rights to obtain security for claims. The implied term has nothing to do with (i), it only concerns (ii) (AMPTC was not in any way seeking to curtail the Claimants' ability to enforce an arbitral award obtained against it, for example). And the reason why the Claimants' ability to obtain security by arresting AMPTC's vessels must necessarily be curtailed relates back to the first component of the Arbitrator's reasoning, namely that the Guarantees themselves were considered adequate security."

71. This again takes one back to the question of what is meant by adequate security? The answer must mean adequate security for breach by Charterer of the charterparty, not for breach by AMPTC of its separate obligations. The question links to the question of double security, which I have considered above.

72. I reach the firm conclusion that this wording conveys absolutely nothing relevant to the exercise of implication of a term.

73. I should perhaps deal here with the variation on this theme which was advanced orally by Mr Berry. That was to suggest that this passage encapsulated a finding of fact by the arbitrator which was therefore not open to challenge on appeal. Ingenious as the point is, it is plainly wrong. As can be seen from [15] of the Award the arbitrator was scrupulous to exclude controversial factual matters from his decision and was not purporting to find facts. Further even without this context the relevant passage does not read like a finding of fact – it is plainly an inference from language and forms part of an essentially legal conclusion. It does not purport to rest on any particular expertise of the arbitrator. And as noted, as an inference it begs the question raised above of: security for what? (I note also that if this point had been a good one, one would of course expect to see it emerge rather earlier in the process.)

74. Finally AMPTC relies (at least in writing) on the arbitrator's finding at paragraph 27 of the First Award that "*I do not think that objectively the parties would have assumed that there would be an entitlement to further security*", saying that he was "*perfectly placed and ideally qualified*" to make that value judgment. However while due respect must be given to commercial arbitrators they are not generally appointed to impose their value judgments at large on the parties or to rewrite their contracts for them.

75. The role of the Arbitrator here was not to do this but to apply the law on implication of terms; and here one can clearly see that the assessment is one which is at odds with the exercise called for when implying a term. In the First Award Mr Hamsher is asking: would the parties assume there would be an entitlement (i.e. should a term for security be implied); rather than the correct question: "*would they agree in testily dismissing the suggestion that there should be security*?". In essence he has turned the burden of proof for implication of a term on its head, or treated the question as if the implied term was one for which Owners and not AMPTC were contending.

76. The bottom line is that there appears to have been an approach which is not in line with the correct test. As Owners note, the Arbitrator's approach appears to have been "skewed" by approaching the implication exercise on the basis that it must be assumed that AMPTC were not in breach. That he did approach the exercise on this basis is clear. This can be seen for example at paragraph 24 of the First Award:

> "[f]or the Owners to be entitled to enforce the rights under the letters of guarantee…would have required both an established failure by AISSOT to perform their obligations and an established failure by AMPTC to perform their obligations under the letters of guarantee".

77. More clearly it can be seen at [26] dealing with what he says is the logical correlate of Owners' argument:

> "The logical result of the Owners' position was that they would be entitled at any stage after the conclusion of the bareboat charterparties and the letters of guarantee to ask for additional security by way of, for instance, a bank guarantee even if there had been no breaches of either of the contracts."

78. It did not prior to oral submissions seem to be in issue that this is how the Arbitrator approached matters; certainly AMPTC had not engaged with this point in writing. At paragraph 26.1 of their permission skeleton they accepted that "*avoiding this situation (the ability to get security where there is no breach) which it now appears to be common ground would be unacceptable, was the main driver behind this component of the Arbitrator's reasoning*."

79. The question of whether a term would fall to be implied if there were no breach is not however relevant; it is not contended that the Owners would be entitled to security in that eventuality. To the extent that the Arbitrator was looking at matters on this basis that was plainly a mistake.

80. In oral submissions Mr Berry attempted to re-dress the argument as one which the Arbitrator had properly understood and taken as addressed to the case of the "*barely arguable claim*" and the "*dodgy guarantor*". But with all possible respect to the skill with which this was done, it is tolerably plain on reading the Award as a whole that this was not the argument which was in play before the Arbitrator and even more so that he did not purport to be addressing this situation. That much is quite clear from [26] of the Award.

81. It appears possible, looking at [24], that the Arbitrator may also have confused the necessity of looking at the matter temporally from the time before contract (when *ex hypothesi* there is no breach) with the contingency which the parties must be assumed to be contemplating. The process properly proceeds on the basis of the question to the parties, or a person in their position: "*If before you entered into the contract you were asked: 'Do you intend for CVLC not to be able to get security for its claims if there were an arguable breach by AMPTC*?' *would you have said 'Of course there should be no security'?"* That question is manifestly not what the arbitrator asked himself. The answer to that question appears self-evidently no – and the more so when one bears in mind the exclusionary nature of the term. It was notable that in argument Mr Berry did not deal with this aspect of the legal argument at all.

82. There also, as the Owners note, appears to be a (probably related) confusion in the Arbitrator's thinking as to when a liability under the letters of guarantee could be triggered. He found that "*liabilities under the letters of guarantee could only be triggered if it had been established that AISSOT had failed properly to perform the*

relevant bareboat charterparties" [22]. That is wrong in law: "*the creditor's cause of action against the guarantor arises at the moment of the debtor's default*" *Moschi v Lep* [1973] AC 331 at 348 per Lord Diplock (subject to points as to the timing of liability under the terms of the particular guarantee); and again this was a point which AMPTC did not dispute.

83. An alleged breach, in the sense of an arguable claim, is all that is required to "trigger" the right to make a demand under the contract of guarantee. Such arguable claim triggers the right to commence arbitration, for example; or to obtain a freezing order; or to arrest assets to found security. None of these rights is dependent upon finally proving the breach. While the question of whether that demand (or that application for a freezing order) was correctly made will only be ascertained later that does not affect the right to make a demand once there is an arguable breach.

84. Finally and stepping back somewhat from the arguments there are simple structural cross checks:

    i) As the Owners note, it is hard to see why it would be the case that they can arrest the Charterer's vessels, but they cannot arrest AMPTC's vessels under a distinct contract "as primary obligor" (which is how they are stated to be under the Guarantees).

    ii) Still more strange would be the result if (as AMPTC argued in its permission application at [27]) by taking the Guarantees from AMPTC, the Owners in fact inadvertently lost their rights to arrest even AISSOT's vessels. This extreme argument cannot be squared with any sensible approach to determining the parties' expectations of the contractual regime. The suggestion is that a party obtaining a guarantee of performance thereby loses all security rights in exchange for the mere unsupported and un-securable word of the guarantor. This is wholly uncommercial. It was sensibly not pursued by AMPTC orally.

85. All roads lead to the same conclusion: structurally one would expect there to be a right of security. The analysis of the correct approach to implication seems to preclude the implication of a term barring security. The Arbitrator's reasoning reaching the converse conclusion diverges from the correct test.

86. I therefore come to the conclusion that the Arbitrator was wrong in his approach to the issue before him and that he was wrong to conclude that the term contended for fell to be implied. The appeal must be allowed.

The Alternative Case

87. AMPTC's alternative case is that that result does not mean that no term falls to be implied into the Guarantees along the lines contended for by AMPTC; and that the matter should be remitted for the arbitrator to consider with the benefit of the factual evidence.

88. What is telling in the way that this is put is not that this question should be remitted as such, but that the matter should be returned to the arbitrator to be dealt with on a different footing. What is said is:

> "At paragraph 15 of the First Award … the Arbitrator explained that he was constrained in answering the question of whether a term could be implied by the fact that the matter was urgent and there "was no opportunity for evidence to be adduced or challenged". …
>
> This meant that a number of the matters identified by Lord Neuberger could not be explored. For example, the Arbitrator records .. that he could not assume that Aissot was a subsidiary of AMPTC, even though he thought the inference "reasonable", or that AMPTC was owned by the governments of a number of Arab nations.
>
> Clearly these matters would or might arguably be relevant to the existence and scope of any implied term and the Court is in no better position than the Arbitrator to take them into account at this hearing.
>
> In these circumstances, AMPTC submits that the correct course would be to remit the matter back to the Arbitrator to reconsider the issue with the benefit of the factual evidence identified above."

89. Remission is, of course, the default position pursuant to section 69(7) unless "*it would be inappropriate to remit*".

90. In this case however I do conclude that it would be inappropriate to remit. What has happened here is that the parties agreed an expedited reference in relation to a matter which was arguably rather unsuited to such a determination. While AMPTC did not specifically agree to the exclusion of factual matrix evidence the timetable gave them ample opportunity to seek to revise the timetable to permit of factual matters being dealt with as part of the determination.

91. The arbitrator has made two Awards and is now *functus* on the questions which were referred to him. This is not a case where there was an error of law to be applied to determined facts where the arbitrator can sensibly re-run the determination based on the evidence he has heard in the light of the clarification on the point of law. I have essentially re-determined the question which was before him already.

92. It is not appropriate for this court to say that the matter should be reopened because there is a possibility that a different answer might have resulted if further and more complete factual matrix evidence had been adduced. That would be an approach which would come close to undercutting the separateness and independence of arbitration, and the speedy finality which the parties chose.

Conclusion

93. It follows that:

    i) The appeal is allowed and the question posed is answered: "No".

ii) I substitute that conclusion for that of the Arbitrator. No purpose would be served by remission.

94. While the question of costs was not addressed before me it would seem likely to follow that AMPTC should pay Owners' costs as asked for in the Claim Form.