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Case No: CL-2017-000567

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Sea Master Shipping Inc	**Claimant**
- and -	
Arab Bank (Switzerland) Limited	**Defendant**

- -
- -

Michael Collett QC (instructed by **Jackson Parton Solicitors**) for the **Claimant**
Chirag Karia QC (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**

Hearing dates: 25 and 26 June 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. This case raises two issues of some importance arising out of a common occurrence in international trade and trade finance banking. An FOB buyer of goods, who has sold on CIF terms and chartered a vessel, loses its on sale during the course of the voyage, and finds a new buyer at a different discharge port. It therefore needs the existing bills of lading to be replaced with new "switch" bills providing for the new discharge port. Its bank holds the original bills as security for the money advanced to its customer for the purchase of the cargo. The owner of the goods agrees with the shipowners to issue new bills of lading and the bank facilitates the transaction by allowing the bills to be switched at its counters, so that the bank retains possession of effective bills at all times to protect its security interest. The new switch bills of lading are consigned to the order of the bank. Does the bank thereby become an original party to the bill of lading so as to come under liability to the shipowners on the terms of the contract of carriage contained in or evidenced by the bill of lading, including, for example, liability for shipment of dangerous cargo or demurrage?

2. The second issue is whether the lawful holder of a bill of lading who has rights of suit under section 2 of the Carriage of Goods by Sea Act 1992 ("COGSA") in respect of the contract of carriage contained in or evidenced by a bill of lading which contains an arbitration clause is bound by that arbitration clause and so bound to submit to arbitration the issue whether it has assumed liabilities under the contract.

3. These issues arise on the Claimant's application under section 67 of the Arbitration Act 1996 to set aside or vary an arbitration award dated 18 August 2017 by which the tribunal held that the Defendant ("the Bank") was not a party to the contract of carriage contained in or evidence by the bills of lading or the arbitration clause contained therein, and accordingly that it had no jurisdiction to determine the Claimant's claims for demurrage and/or damages for detention against the Bank.

4. Section 67 of the Arbitration Act 1996 provides:

> "67 Challenging the award: substantive jurisdiction.
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction;
>
> …
>
> (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award, or
>
> (c) set aside the award in whole or in part."

5. Section 67(1)(a) applies both when a tribunal finds that it has jurisdiction and also, as in the present case, when it declines jurisdiction: ***LG Caltex v China National Petroleum*** [2001] 1 WLR 1892 at paragraph [71]. Such challenges involve a full rehearing of the question of the arbitral tribunal's jurisdiction, as opposed to a review of its decision; the Court's role is to decide whether or not the tribunal reached the correct decision and not simply to decide whether the tribunal was entitled to reach the decision it did: ***Azov Shipping Co v Baltic Shipping Co (No 1)*** [1999] 1 Lloyd's Rep 68; ***Peterson Farms Inc v C&M Farming Ltd*** [2004] 1 Lloyd's Rep 603.

6. In this case the parties adduced evidence before me which was not before the arbitrators, in the form of documentation and witness statements. The parties agreed that the witness statements should be given such weight as the Court thought fit without the need for the witnesses to be called and cross-examined.

The facts

7. The cargo in question comprised 7,000 metric tonnes of Argentine extracted toasted soyabeanmeal in bulk, which was shipped on board the vessel MV SEA MASTER at San Lorenzo, Argentina, on or about 24 June 2016. The vessel was owned by Sea Master Special Maritime Enterprise, from whom the Claimant purchased it following the events giving rise to the dispute, taking an assignment of rights. Nothing turns on the distinction between the former and current shipowners for the purposes of the application, and I will refer to them simply as "the Owners". The cargo was one of a number shipped on the vessel by Oleaginosa Moreno Hnos. S.A.C.I.F.I.Y.A. ("Oleaginosa") and was stowed in hold number 2. Oleaginosa had sold the cargo on FOB terms to Glencore Grain BV, who had in turn sold it on FOB terms to Agribusiness United DMCC ("Agribusiness") by a contract of sale dated 24 February 2016. On 25 April 2016 Agribusiness concluded a voyage charterparty on an amended Norgrain 89 form with the Owners providing for carriage from one or two Argentina upriver ports to discharging ports in Morocco with options within a range between Agadir and Casablanca. The charter incorporated by reference a provision for London arbitration on the terms of the applicable LMAA clause, which covered "any dispute arising out of or in connection with this Contract".

8. The cargo was covered by the issue of seven bills of lading numbered 12 to 18 on the Congenbill 2007 form, each bill being for a part quantity of the total 7,000 metric tonnes. Two of the bills provided for discharge at Agadir in Morocco; the remainder provided for discharge at Casablanca. In each case the bills named Oleaginosa as the shipper and were consigned to order, with various different notify addresses in Morocco. The bills provided that freight was payable as per the charterparty and expressly incorporated the terms, conditions, liberties and exceptions of the charterparty including the arbitration clause.

9. The vessel sailed from San Lorenzo to Agadir where she arrived on 14 July 2016. Neither Agribusiness or the Bank had yet acquired the original bills of lading from Glencore under the purchase contract. At this stage Agribusiness had arranged a sale of the cargo to buyers, but that sale fell through. None of the soyabeanmeal cargo was discharged at Agadir.

10. On 15 July 2016 Agribusiness entered into a new sale contract with new buyers, Sarl El Alf, for sale on terms CFR Oran, Algeria. Those terms provided for payment to be

made to Agribusiness by presentation of documents, including bills of lading, under a letter of credit issued by Banque Nationale D'Algerie and confirmed by Al Masraf Bank in Dubai.

11. The vessel sailed from Agadir to Casablanca where she arrived on 21 July 2016.

12. The original bills of lading were presented by Glencore to the Bank and accepted under the documentary credit opened on behalf of its customer Agribusiness. The Bank paid against them on 27 July 2016 and became lawful holder of the bills. The Bank's relationship with its customer, Agribusiness, was governed by a Pledge Agreement dated 12 September 2012 under which Agribusiness pledged and assigned to the Bank all rights arising from the documents of title in relation goods financed by the Bank, including bills of lading. The Bank therefore held the bills of lading for its security interest in the usual way. In the normal course such a trade finance bank would present the bills under its customer's sale contract to receive the sale proceeds directly from the customer's buyer and so discharge its financing.

13. The new sale to Sarl El Alf required Agribusiness to negotiate an amendment to the charterparty because Algeria was outside the charterparty discharge port range. The vessel was at this stage incurring demurrage at Casablanca. It appears that on or about 1 September 2016 Agribusiness reached agreement with the Owners for the vessel to go Algeria for discharge in return for an immediate payment in respect of demurrage, and a further payment before breaking bulk at discharge in respect of load port demurrage and a balance of freight. The vessel sailed for Algeria and arrived at Oran on 15 September 2016.

14. Although agreement had been reached between Agribusiness and the Owners for discharge in Algeria, the original bills of lading providing for discharge in Morocco remained the only bills which had been issued at this stage. The original bills of lading had been sent by the Bank to Al Masraf Bank, but they were not valid for negotiation because they did not provide for discharge in Algeria. Agribusiness negotiated with the Owners for the issue of new bills of lading and on 21 September 2016 Omnitradia, acting for and on behalf of the Owners, signed and released a replacement bill of lading number 12 in respect of the entire cargo of 7,000 metric tons ("the first switch bill"). This occurred at the counters of Al Masraf Bank in Dubai. The first switch bill named Oleaginosa as the shipper and was consigned to the order of Banque Nationale D'Algerie with Sarl El Alf identified as the notify party. It provided for discharge at Oran, Algeria and was otherwise on the same terms as the original bills of lading (save for erroneously identifying the charterparty as being dated 13 May 2016). The original bills of lading were not cancelled when the first switch bill was issued, despite instructions to Al Masraf Bank from Agribusiness to mark the original bills of lading as null and void and to return them.

15. Al Masraf Bank rejected the documents including the first switch bill as non-compliant. The first switch bill was sent by Al Masraf Bank to the Bank on 22 September 2016. The original bills of lading, which had not been cancelled, were retained by Al Masraf Bank until they were returned to the Bank on 6 October 2016.

16. On or about 18 October 2016 the Bank marked the first switch bill cancelled, with the authority of the Owners and Agribusiness, and returned it to Omnitradia. It is common ground that by this date at the latest, the Bank became once more the lawful holder of

the original bills of lading. It is the Owner's case that it became the lawful holder when it received the original bills back from Al Masraf Bank on 6 October 2016, but nothing turns on any difference between the dates.

17. Meanwhile the vessel was incurring demurrage at Oran and Agribusiness needed to find a new buyer for the cargo. On 17 October 2016 Agribusiness concluded a new contract of sale with Black Sea Grain SARL ("Black Sea Grain") on CIF Lebanon terms. Payment was to be against documents presented to Credit Libanais as Black Sea Grains' bank. Accordingly, it was necessary for Agribusiness and the Owners to agree upon (a) a variation to the charterparty and (b) the issue of a new switch bill of lading, to reflect the new discharge port in Lebanon.

18. Those matters were agreed on 7 and 8 November 2016 in circumstances which are at the heart of the current dispute. The upshot was an addendum to the charterparty signed on 7 November 2016, and the issue at the counters of the Bank on 8 November 2016 of a second switch bill of lading against cancellation of the original bills of lading ("the second switch bill"). In particular:

    (1) The addendum to the charterparty between Agribusiness and the Owners provided for the voyage to be extended to Beirut or Tripoli. The original bills of lading were to be surrendered to Owners' representatives at the Bank; and upon surrender they were to be substituted by a single bill of lading for the cargo for discharge and delivery in the Lebanon with the bill of lading being marked freight payable as per charterparty. Within three days of release of the new bill of lading Agribusiness was to pay a lump sum of US$300,000 and provide a promissory note to be held in escrow to secure final accounts of freight and demurrage.

    (2) The second switch bill was signed by Captain Stratikopoulos as the Owners' agent at the counters of the Bank. It identified Oleaginosa as the shipper and the consignee was designated "to the order of [the Bank]". Black Sea Grains was identified as the notify party. It provided for discharge at Tripoli or Beirut and was otherwise in the same terms as the original bills, save that the charterparty was identified as that dated 25 April 2016 "as amended". It expressly incorporated the arbitration clause in the charterparty. The original bills were marked cancelled by the Bank at the same time and returned to Captain Stratikopoulos.

19. The second switch bill was presented by the Bank to Credit Libanais, endorsed in blank by the Bank, for payment under the Black Sea Grains sale. However that sale too fell through. The second switch bill was returned to the Bank with the blank endorsement cancelled. Agribusiness resold the cargo yet again to Yousef Freiha & Sons on CIF Lebanon terms on 28 November 2016. The second switch bill was endorsed in blank by the Bank and presented for payment under that contract, under which it was accepted and payment made. The cargo was eventually delivered to Yousef Freiha & Sons in Lebanon against presentation of the original second switch bill.

The Arbitration Proceedings

20. On 22 March 2017 the Bank commenced arbitration proceedings against the Owners in respect of claims under 10 of the bills of lading relating to other cargo on board the

vessel (a shipment of corn). The Owners brought a counterclaim against the Bank for demurrage and/or damages for detention under the second switch bill claiming US$1,629,696.06. The Bank contended that it was not a party which had undertaken any obligations under the second switch bill and was not party to the arbitration agreement; accordingly it challenged the jurisdiction of the tribunal to determine the counterclaim. The tribunal resolved to determine the question of jurisdiction as a preliminary issue without an oral hearing. In its final award on jurisdiction it determined that the Bank was not a party to the agreement to switch the bills of lading, either in respect of the first or second switch bills; and rejected the argument that the Bank became party to the bill of lading contracts. It rejected an argument that the Bank had made a demand for delivery of the cargo or made a claim against the vessel under the contract of carriage so as to incur liabilities under section 3 of COGSA. For those reasons, it held that it did not have jurisdiction to determine the Owners' counterclaim for demurrage against the Bank.

The issues

21. The relevant provisions of COGSA are the following:

"1.— Shipping documents etc. to which Act applies.

(1) This Act applies to the following documents, that is to say—

(a) any bill of lading;

…..

(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.

…..

2.— Rights under shipping documents.

(1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

…..

shall (by virtue of becoming the holder of the bill…) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

…..

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

…..

3.— Liabilities under shipping documents.

(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

…..

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

5.— Interpretation etc.

(1) In this Act—

“bill of lading”, … shall be construed in accordance with section 1 above;

“the contract of carriage” —

(a) in relation to a bill of lading…., means the contract contained in or evidenced by that bill …;

“holder”, in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

…..

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith."

22. The Owners' case is that the Bank was the original party to the second switch bill under normal principles of contractual formation by reason of the circumstances in which it was issued and the Bank's involvement in its issue at the Bank's counters; and so owed the liabilities under the contract contained in it; being an original party to the bill made the Bank a party to the arbitration clause and conferred jurisdiction on the arbitrators to determine the Owners' demurrage counterclaim against the Bank. The Bank's case is that it was not the original party to the second switch bill; Agribusiness was. It recognised that it became the lawful holder of the second switch bill, to protect its security interest, but asserted that it did so solely by virtue the bill being consigned to its order and so bringing it within section 5(2)(a) of COGSA. It contended that the result was that it had vested in it the rights of suit as if it were a party to the contract of carriage contained in or evidenced by the bill pursuant to section 2 of COGSA; but it had not performed any of the acts triggering liability under section 3 of COGSA (which was not disputed before me); and that accordingly, the Bank was not bound by the arbitration clause and the tribunal was correct to hold that it had no jurisdiction.

23. In the skeleton arguments filed before the hearing, the parties treated the question of the tribunal's jurisdiction as being determined by the substantive rights of the parties, and in particular as turning on the validity of the Owners' argument, which the Court had to decide on the evidence before it, that the Bank became an original party to the second switch bill by reason of the Bank's involvement in its issue at the Bank's counters. At the outset of the hearing, I raised the question whether even if the Owners were wrong in asserting that the Bank was an original party to the second switch bill, there might still arise a question whether the Bank was party to the arbitration agreement, because on its own case the Bank acquired rights under section 2 of COGSA, which might arguably make it a party to the arbitration agreement; if so, whichever side was right on the substantive dispute about whether the Bank was an original party to the bill, the tribunal had jurisdiction to decide that issue and it was a matter for the tribunal not the court to determine. Mr Collett QC who appeared on behalf of the Owners was understandably reluctant to urge this approach on the Court, no doubt because although it would result in the section 67 application succeeding, the tribunal had already decided the substantive dispute against the Owners in the course of deciding that it had no jurisdiction and might be expected to do so if and when the matter was remitted by the Court on the basis that it had jurisdiction to decide the question. I received further written and oral argument on the point from both sides, in which the Owners adopted the point in the alternative, subject to an argument that it

would be consistent with the principle of speedy finality reflected in section 1(a) of the Arbitration Act 1996 for the Court to decide the substantive question because remitting it to the tribunal would result in further delay and expense.

24. There are therefore two issues which fall for determination:

(1) Is the question whether the Bank assumed liabilities under the contract of carriage one within the jurisdiction of the arbitrators by reason of the Bank's admitted acquisition of rights of suit under the second switch Bill by reason of section 2 of COGSA; or does the tribunal's jurisdiction depend upon the answer to the question whether the Bank was an original party to the second switch bill? I shall call this the arbitrability issue.

(2) If the latter, was the Bank an original party to the second switch bill? I shall call this the substantive issue because although it arises in the context of a challenge to the jurisdiction of the tribunal its resolution affects the substantive rights and liabilities of the parties.

25. It is convenient to deal with the arbitrability issue first because if determined in the Owners' favour the section 67 application must succeed and the substantive issue is one for the tribunal. In those circumstances it would be wrong for the Court to trespass upon the arbitrators' jurisdiction to decide the substantive issue, both as a matter of principle, and because although it is raised in the context of the jurisdiction of the arbitrators it also affects the substantive rights of the parties. Although it has already been addressed by the tribunal, it cannot be treated as a matter for the Court on a section 67 application simply as a matter of case management or convenience. Nor does section 1(a) of the Act provide grounds for doing so. If the issue is one within the jurisdiction of the tribunal, the Owners are bound by the tribunal's determination subject to a limited right of appeal on a question of law. It cannot circumvent that outcome by asking the court to decide the issue under section 67 if there is in truth no dispute but that the tribunal does have jurisdiction. An appeal against a determination by the tribunal of matters within its jurisdiction is narrowly confined by section 69 of the Act and the Court is bound by the tribunal's findings of fact; by contrast a challenge to jurisdiction under section 67 involves a hearing in which the Court receives the evidence on which it decides the issue without reference to the findings of the tribunal. The two cannot simply be conflated. In any event section 1(a) provides for the "fair resolution of disputes by an impartial tribunal without unnecessary delay or expense." The "impartial tribunal" referred to is the arbitral tribunal, not the Court. The subsection provides no basis for the Court assuming a jurisdiction which belongs to the arbitrators.

The Arbitrability Issue

26. Mr Karia QC's argument on behalf of the Bank was attractive in its simplicity. It was that the separation of rights and obligations which provides the framework for the structure of COGSA applies as much to the arbitration clause as to any other term of the contract of carriage contained in or evidenced by the bill of lading. The effect of section 2 of COGSA is to vest in the holder rights of suit under the contract of carriage; it vests a right to arbitrate (with an attendant obligation to do so if the rights of suit are exercised), but no obligation to do so if it does not exercise the rights of suit vested by section 2. He argued in the alternative that if there had arisen any obligation to arbitrate, it was lost along with the divestment of the section 2 rights which occurred

when the Bank negotiated the bill to Yousef Freiha & Sons' bank and ceased to be the lawful holder under section 2, which it was common ground occurred prior to the commencement of the arbitration.

27. Mr Collett argued that when the Bank acquired rights of suit under section 2 of COGSA they were "as if [it] had been a party to" the contract of carriage contained in or evidenced by the bill of lading; that made the Bank a party to the arbitration agreement which then applied to an arbitrable dispute whichever party brought the claim under the contract of carriage; and the arbitration agreement continued to operate notwithstanding the subsequent divestment of the rights of suit under section 2 of COGSA.

28. It is well established that where an assignee acquires rights under a contract which contains an arbitration clause, its entitlement to exercise those rights is qualified by the obligation to do so in arbitration; this is so whether the assignment is contractual or statutory: see ***Schiffahrtsgesellschaft detlev von Appen GmbH v Voest Alpine Intertrading GmbH*** (***The Jay Bola***) [1997] 2 Lloyd's Rep 279 and ***Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Naklyat Ve Ticaret AS (The Yusuf Cepnioglu)*** [2016] 1 Lloyd's Rep 641 at paragraphs [2], [23]-[25]. There is, however, no case to which I was referred which directly addresses whether an assignee of rights who is not seeking to exercise them is bound by an arbitration clause. It is therefore necessary to consider the problem from first principles.

The doctrine of separability

29. The starting point is the principle that an arbitration agreement has a separate and independent existence from that of the matrix contract in which it is found. It was described in ***Bremer Vulkan Schiffbau Und Machinenfabrik v South India Shipping*** [1981] AC by Lord Diplock at page 980 as "a self-contained contract collateral or ancillary to" the shipbuilding contract in which it was to be found in that case. Lord Scarman described it at page 998 as "a separate contract ancillary to the main contract".

30. One aspect of this doctrine of separability is that the agreement may confer jurisdiction on the arbitrators to determine disputes notwithstanding the termination or even initial invalidity of the matrix agreement giving rise to the disputes. The foundation of an arbitrator's jurisdiction to determine a dispute lies in the separate arbitration agreement. If such agreement does not exist, as for example where a person is not a party to the matrix contract in which it is found, there is in truth no arbitration agreement between the parties. Where that is in dispute, the issue can only be resolved by the court because a lack of consensus to the arbitration agreement deprives the arbitrator of any jurisdiction. As the learned editors of Mustill & Boyd on *Commercial Arbitration* 2nd edn put it at pages 6-7, "In the eyes of English law it is a logical absurdity to hold that the arbitrator can ask himself a question which, if answered in the negative, implies that he had no jurisdiction to ask it". Nevertheless, in a series of decisions following ***Heyman v Darwins Ltd*** [1942] AC 356, English law increasingly recognised that if there has been consensus to the arbitration agreement, then provided it is drawn in wide enough terms, it may encompass disputes which affect the validity or continued existence of the matrix contract in which it is found. Such separability was increasingly recognised and applied. In the landmark decision in ***Harbour Assurance (UK) Ltd v Kansa General International Insurance Co Ltd*** [1992] 1 Lloyd's Rep 81, in which Steyn J's reasoning was approved on appeal at [1993] QB 701, the doctrine was applied

to an issue of illegality which would render void ab initio the matrix contract. The doctrine is now reflected in section 7 Arbitration Act 1996 which provides:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

31. It follows from the doctrine of separability that one cannot assume that a statute such as COGSA which addresses the substantive rights and obligations of the parties under a matrix contract intends to treat the rights and obligations under the ancillary arbitration agreement in precisely the same way.

The nature of "rights" and "obligations" under an agreement to arbitrate

32. Two aspects of the nature of an arbitration agreement are to my mind central to the current debate. The first is that the obligations under an arbitration agreement arise not upon the exercise of rights of suit or pursuit of arbitral proceedings by either party, but upon a prior event. The collateral agreement contained in the arbitration clause is an agreement between the parties as to what each of them will do if and whenever there occurs an event of a particular kind, namely the coming into existence of an arbitral dispute, i.e. one which falls within the scope of the arbitration agreement. That may arise from either party asserting a claim. If it is disputed, the arbitration agreement provides for what each party is to do in the event of such dispute.

33. In Mustill & Boyd on *Commercial Arbitration* 2nd edn page 506 and footnote 16 the relationship created by an arbitration clause is described as being nearly, if not quite, a mutual conditional option, a description endorsed as accurate by Phillips J in ***The London Steamship Owners Mutual Insurance Association Ltd v Bombay Trading Co Ltd (The "Felicie")*** [1990] 2 Lloyd's Rep 21 at page 23. The condition is that there has arisen an arbitral dispute. The option is that of either party to have the dispute resolved in arbitration. There can exist arbitration agreements where the option is unilateral not mutual, but they do not affect the analysis in this case.

34. For present purposes the important part of this definition lies in the "nearly but not quite". This is not quite a sufficient summary because the arbitration agreement contains obligations and negative undertakings both in circumstances where the option is exercised and where it is not. If one party exercises the option to have the dispute resolved in arbitration, the other is under further obligations. Some arise under the Arbitration Act 1996 which is often incorporated into the arbitration agreement by express reference as it was under the LMAA clause in this case; for example the obligation to pay reasonable fees and expenses to the tribunal under section 28; and the obligation to do all things necessary for the proper and expeditious conduct of the arbitral proceedings under section 40. Others arise by implication, for example the obligation on both parties to cooperate to progress the arbitration proceedings expeditiously (the ***Bremer Vulkan case*** sup. at page 986C) which is an incident of the arbitration agreement itself not a new contract arising out of the reference (***ibid*** at p.983G-H and see ***Furniss Withy (Australia) Pty Ltd v Metal Distibutors (UK) Ltd ("The Amazonia")*** [1990] 1 Lloyd's Rep 236 per Staughton LJ at page 244). Another

is the obligation on both parties to comply with the award, which again arises as an incident of the arbitration agreement itself.

35. These obligations arise when one party has exercised the option to commence arbitration proceedings, although it doesn't matter which party. But other obligations are not dependent on either party having exercised the option to commence an arbitration. Irrespective of the exercise of that option by either party, each party makes a promise not to seek to have an arbitral dispute resolved other than by arbitration. This negative undertaking underpins the power of the Court to grant a stay under section 9 of the Act, and to grant an injunction against pursuit of an arbitral claim in court proceedings outside this jurisdiction: see for example ***Angeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)*** [1995] 1 Lloyd's Rep 87. It is not dependent on the commencement of arbitration proceedings or even the commencement of any other form of proceedings: a threatened commencement of suit in breach of the arbitration clause may be restrained. This is because it is not the pursuit of any substantive rights which triggers obligations but rather a different event, namely the coming into being of an arbitral dispute. The obligation not to seek to have a dispute resolved otherwise than in arbitration is a negative undertaking given at the time an arbitration agreement is reached as part of that agreement, and gives rise to an obligation at that stage, albeit a prospective and conditional one. Lord Diplock expressed the point in this way in the ***Bremer Vulkan*** case (sup.) at page 982A-D:

> … "The collateral agreement contained in the arbitration clause does not fit readily into a classification of contracts that are synallagmatic on the one hand or unilateral or " if " contracts on the other. It is an agreement between the parties as to what each of them will do if and whenever there occurs an event of a particular kind.
>
> The event is one that either party can initiate by asserting against the other a claim under or concerning the shipbuilding agreement which they have not been able to settle by agreement. In that event, each is obliged to join with the other in referring the claim to arbitration and to abide by the arbitrator's award. The arbitration clause itself creates no obligation upon either party to do or refrain from doing anything unless and until the event occurs, and even then the mutual obligations that arise are in relation to the particular claim that constitutes the event. The primary obligations of both parties that arise then are contractual whether express, or implied by statute or included by necessary implication in the arbitration clause."

36. That being so, it seems to me to make little sense to speak of an arbitration agreement as conferring merely a right to arbitrate, or merely attaching a condition on a party which applies if and when substantive rights under the matrix contract are asserted or suit commenced by that party to establish such substantive rights. An arbitration agreement contains obligations by which a party is bound irrespective of the assertion of substantive rights by that party or the commencement by that party of arbitration or other proceedings. They arise when there is an arbitral dispute, irrespective of which party is the maker or recipient of the claim which is disputed. If the assertion or exercise of rights by a party under the matrix contract is not the condition or event which triggers

that party's obligations under the arbitration agreement, it is difficult to see how one can meaningfully separate rights and obligations under the arbitration agreement in a way which confines the obligation on a party to arbitrate as arising only when and if rights under the matrix contract are asserted by that party.

37. The second feature of an arbitration agreement which I regard of central importance to the current debate is that however one categorises the bundle of rights, obligations or options in an arbitration agreement, they are mutual and interdependent. Once an arbitral dispute has arisen, they apply whichever party is the protagonist in seeking to bring the dispute before an arbitrator or before some other forum for resolution. If A asserts a claim against B, the dispute to which it gives rise may be proposed for resolution by either party. A may seek to enforce it, or B may seek to have it resolved by claiming a declaration of non-liability (in each case either in arbitration or not). In proceedings brought by A in relation to a claim outside the scope of an arbitration agreement, B may raise an issue within its scope by way of defence (e.g. in reliance on an exclusion clause as a defence to a tort claim, or a transactional set-off under a different contract from that on which A sues). In such a case the arbitral issue is subject to a mandatory stay under section 9 of the Arbitration Act 1996. The rights, obligations and options in the arbitration agreement must operate equally whichever course is adopted or threatened, because the mutuality of the agreement bites on arbitral disputes, not on claims.

38. The Law Commission recognised these considerations in its Report "*Privity of Contract: Contracts for the Benefit of Third Parties*" (1996) (Law Com No 242) at paragraphs 14.14-14.18. The Report recommended that arbitration agreements be outside the scope of the reform. In the event, a specific provision was introduced at the Report stage in the House of Commons resulting in the particular provisions of section 8 of the Contracts (Rights of Third Parties) Act 1999 which specifically address the operation of that Act to arbitration clauses. The reasoning of the Law Commission is instructive. It was initially attracted to an approach which mirrored Mr Karia's submissions in this case, namely that an arbitration agreement could operate as a procedural benefit to the third party and could operate as a procedural condition on the third party's right to enforce the substantive promise in the contract. In other words, if and when the third party wished to enforce its substantive right, it would be entitled and bound to do so in arbitration. However for the reasons set out in the Report, it regarded that approach as unacceptable, and concluded at paragraph 14.18 that "arbitration and jurisdiction clauses must be seen as both conferring rights and imposing duties and do not lend themselves to a splitting of the benefit and the burden." Two of their reasons apply equally in the present context. One was the fact that a declaration as to rights might be sought against the third party without the third party being the one seeking to enforce any substantive promise (see paragraph 14.17(iii)). The other was that arbitral disputes may include defences such as reliance on an exclusion clause, so that again the third party would avoid submitting to arbitration an arbitral dispute when advancing a defence rather than seeking to enforce a substantive right under the matrix agreement (see paragraph 14.17(ii)).

The principles applied to section 2 of COGSA in this case

39. For these reasons I am unable to accept that the intended effect of sections 2 and 3 of COGSA is to bifurcate an arbitration clause in the contract of carriage contained in or evidenced by the bill of lading into rights and obligations, such as to confer arbitration

rights under section 2 and arbitration obligations under section 3. The operation of section 2 of COGSA involves a lawful holder becoming a party to the arbitration clause in the contract of carriage contained in or evidenced by the contract of carriage because the section treats him as if he had been a party to that contract. The holder is a party to that separate arbitration agreement, with all the consequences which flow from such agreement, including the mutual obligation to have any dispute falling within the scope of the agreement determined in arbitration, irrespective of whether it owes any substantive obligations under the matrix contract contained in the bill.

40. Moreover it would be contrary to the very nature of an agreement to refer disputes to arbitration if one party were entitled to litigate an arbitral dispute but the other entitled and bound to arbitrate it. Yet this would be the result of the Bank's argument in this case. The Bank could seek a declaration of non-liability under the second switch bill in arbitration, because, on its analysis, it had vested in it the rights under the arbitration agreement including the right to arbitrate; yet it would not be bound to submit that dispute to arbitration if it were the Owners who sought to enforce it in arbitration because, so it is argued, it had not assumed any obligation to arbitrate under the arbitration agreement. This anomaly would be contrary to the mutuality of an arbitration agreement which applies to arbitral disputes irrespective of which party is the protagonist in seeking to have them resolved.

41. It also follows from the Bank's case that if a lawful holder of a bill of lading were sued by the Owners in court proceedings on the grounds that it had committed one of the acts which imposed liability under section 3, and the holder disputed that it had done so, the holder could insist on the section 3 issue being submitted to arbitration because it would have acquired the "right" to do so under the arbitration agreement; yet if the Owners sought to advance the claim in arbitration asserting the section 3 liability, the holder could in effect insist on the section 3 issue being determined by the Court on the grounds that the tribunal had no jurisdiction to decide the question if it had not in fact committed a section 3 act so as to assume the "obligation" to arbitrate under the arbitration agreement. This involves treating the agreement to arbitrate a dispute as entitling a party to insist on arbitrating a dispute but not obliging him to submit the very same dispute to arbitration, which is impermissible by reason of the mutual nature of the agreement to arbitrate. The true position is that, subject to the wording of the particular arbitration clause, the question whether the holder has committed a section 3 act is an arbitral issue; and if the effect of section 2 of COGSA is to entitle the lawful holder of the bill of lading to arbitrate that dispute, its effect must also be to require the holder to do so. Indeed were it otherwise, a lawful holder of a bill of lading who had assumed the liabilities under section 3 could deprive the shipowner of his right to have that question decided by arbitration by the simple expedient of denying the allegation and requiring the court to decide it.

42. This conclusion accords with the reasonable expectation of businessmen. A bill of lading is not merely a document of title but contains or evidences the contract of carriage, and the terms on which a shipowner receives goods as bailee; and as such is the document by which a shipowner defines the terms on which goods are carried vis-à-vis all those who are and may subsequently be interested in the cargo, other than with the charterer in whose hands it is often but not always a mere receipt. Where that contract of carriage specifically provides for resolution of disputes in arbitration, and where the clause is drawn in wide terms covering disputes "arising out of or in

connection with" the contract of carriage, the reasonable expectation of businessmen would be that all disputes in relation to the maritime venture between the shipowners and those interested in the cargo, including all questions of who has rights of suit and liabilities under the contract of carriage contained in or evidenced by the bill of lading, will be subject to the single defined dispute resolution mechanism. This imperative has long been recognised: see the decision of the House of Lords in ***Fiona Trust & Holdings v Privalov & others*** [2008] 1 Lloyd's Rep 254, per Lord Hoffmann at paragraphs [6], [7] and [13] endorsing what as Hoffmann LJ in ***Harbour v Kansa*** [1993] QB 701 he had characterised as the "*presumption in favour of one-stop adjudication*" at page 726B.

43. Mr Karia drew my attention to the decision of Aikens J in ***Primetrade AG v Ythan Ltd (The Ythan)*** [2006] 1 Lloyd's Rep 457, in which there was a section 67 application before the court challenging the jurisdiction of a tribunal in a claim brought by shipowners for shipment of a dangerous cargo under bills of lading containing an arbitration clause; the claim was brought not against the shippers but against a party to a contract of affreightment, Primetrade, whom the shipowners alleged had become lawful holders of the bills under section 2 of COGSA and had assumed liabilities under section 3 by virtue of "making a claim" in seeking a letter of undertaking from the shipowner's P & I Club. The tribunal held unanimously that Primetrade became a lawful holder of the bills under section 2 and by a majority that it had made a claim attracting the transfer of liabilities under section 3. Aikens J held that Primetrade had never become lawful holders of the bills. That was sufficient to justify his conclusion that the tribunal had no jurisdiction, it being common ground that no liabilities can arise under section 3 unless the person is the lawful holder of the bills under section 2, and there being no basis therefore for Primetrade being parties to the arbitration clause in the bill of lading. Nevertheless Aikens J went on to consider, obiter, whether Primetrade had "made a claim" on the hypothesis that he was wrong on the lawful holder point, and concluded that Primetrade had not done so. If my analysis above is correct, Aikens J was wrong to do so because on the hypothesis that Primetrade was the lawful holder of the bills, the section 3 question was within the jurisdiction of the tribunal and a matter for them. It is clear, however, that this point was never canvassed before him, and indeed that there was no debate before him of how Primetrade would be bound by the clause even if the shipowners' arguments were correct: see the judge's own analysis at paragraph [8]. Since the point at issue was not addressed and the most that can be said is that if my analysis is right Aikens J addressed an issue which was a question for the arbitrators not the court in a part of his judgment which was obiter, the case does not cause me to alter my conclusions.

The divestment argument

44. The argument that the Bank divested itself of the obligation to arbitrate with the divestment of rights under the bill of lading is unsound because of the separability doctrine. Once party to an agreement to arbitrate, the extinguishment of rights under the matrix contract does not affect the arbitration agreement, which remains applicable to disputes falling within its ambit. The arbitration clause in this case would, for example, govern a dispute as to whether the rights of suit had been divested, or whether they were so divested prior to a section 3 act. If, as I have concluded, the effect of becoming lawful holder of the second switch bill was to subject the Bank to an obligation to arbitrate disputes falling within the scope of the arbitration clause it

contained, and if, as is clear, the scope of the arbitration clause is wide enough to encompass whether the Bank owes substantive obligations under the second switch bill, the tribunal had jurisdiction to determine that question, and the subsequent divestment of substantive rights of suit under the second switch bill cannot affect the question.

Conclusion

45. It follows that the section 67 application succeeds on the arbitrability issue. For the reasons I have given, it would be inappropriate to express a view on the substantive issue, which is a matter for the tribunal.