Neutral Citation Number: [2016] EWHC 2110 (Comm)

Case No: CL-2014-000679

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

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

Date: 15 August 2016

Before :

MR JUSTICE PHILLIPS

- -

Between :

GOLDEN ENDURANCE SHIPPING SA

Claimant

- and -

(1) RMA WATANYA SA
(2) AXA ASSURANCE MAROC SA
(3) WAFA ASSURANCE SA **Defendants**
(4) DALIA COMODEX SA

- -
- -

Michael Collett QC (instructed by **Jackson Parton Solicitors**) for the **Claimant**
Jessica Wells (instructed by **Holman Fenwick Willan LLP**) for the **First to Third Defendants**

Hearing dates: 23 February, 27 July and 3 December 2015, further written submissions 13 and 28 April 2016

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Approved Judgment

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Mr Justice Phillips :

1. The dispute underlying these proceedings concerns damage to a cargo of 6,489.95 mt of wheat bran pellets shipped to Morocco on the claimant's vessel, *Golden Endurance* ("the Vessel"), in June and July 2013. The cargo was loaded at Owendo (in Gabon), Lomé (in Togo) and Takoradi (in Ghana) and was the subject of three separate bills of lading, one issued at each of those ports, each providing that freight was payable "*as per Charter-Party dated 11 June 2013*".

2. On the Vessel's arrival at Casablanca on 2 August 2013 the cargo was found to be damaged by the presence of live insects and wet and black mould. Discharge commenced on 27 August but stopped on 31 August 2013 when approximately 4,168 mt of the cargo remained on board.

3. The first to third defendants ("the Insurers") are the subrogated insurers of the fourth defendant, the cargo receiver ("the Receiver"). On 2 September 2013 the Insurers procured that the Vessel was arrested, seeking security for US$1,010,713.32 in respect of damage to the cargo, security which the claimant duly provided on 30 September 2013 in the form of a guarantee from Moroccan Bank for External Commerce ("MBEC"). The Vessel sailed from Casablanca on 6 October 2013. The remaining cargo was subsequently discharged and sold at Cadiz.

4. The dispute gave rise to a multiplicity of proceedings. On 25 March 2014 the Insurers brought a cargo claim against the Master of the Vessel and MBEC in the Commercial Court of Casablanca ("the Moroccan proceedings"). On 4 July 2014, the claimant commenced these proceedings against the Insurers and the Receiver, seeking a declaration of non-liability, damages and an anti-suit injunction. On 14 October 2014 the claimant commenced arbitration proceedings in London against the Insurers and the Receiver in respect of the cargo carried under the Lomé bill.

5. On 25 November 2014 Burton J (i) granted an anti-suit injunction in respect of the cargo carried under the Lomé bill, restraining proceedings other than before arbitrators in London, (ii) dismissed the Insurers' challenge to the jurisdiction of the English court in respect of the claims relating to the cargo carried under the Owendo and Takoradi bills, but (iii) refused to grant an injunction to restrain the Moroccan proceedings in so far as they related to the cargo carried under those two bills: see *The Golden Endurance* [2014] 1 Lloyds' Rep 266. As Burton J recognised, with regret, the result was that all three sets of proceedings remained on foot (see [47]).

6. On 24 February 2015 judgment was pronounced in the Moroccan proceedings, awarding the Insurers damages of 8,439,943.83 Dirhams in respect of the cargo carried under the Owendo and Takoradi bills ("the Moroccan Judgment"). The Moroccan Judgment was confirmed in writing on 10 April 2015. An appeal by the Master of the Vessel and the claimant was rejected on 17 March 2016 as being out of time (in the case of the Master) and by a non-party (in the case of the claimant).

7. This judgment determines the following:

    i) the preliminary issue of whether the Moroccan Judgment should be recognised by this court, so that the claimant is estopped *per rem judicatam* from pursuing its claim for a declaration of non-liability in these proceedings. The question is

whether the claimant has submitted to the jurisdiction of the Moroccan courts (or should be treated as having done so by virtue of its conduct of these proceedings);

ii) if the Moroccan Judgment is not to be recognised, whether the claimant is entitled, on a summary basis, to a declaration of non-liability on the ground that any cargo claim is time-barred pursuant to Article III rule 6 of the Hague Rules, no suit having been brought with one year after the date when the goods were or should have been delivered. The question in that regard is whether either the Moroccan proceedings or the claimant's own claim in these proceedings (both commenced within one year of the relevant date) constitutes valid suit for these purposes.

8. The above issues were argued between the claimant, represented by Mr Collett QC, and the Insurers, represented by Ms Wells. The Receiver has not acknowledged service of these proceedings and has played no part in them. The claimant therefore sought permission pursuant to CPR 24.4(1) to include the Receiver in its application for summary judgment. As the Receiver was notified of the application and the hearing but chose not to appear (no doubt because it has transferred its relevant interests to the Insurers) and in any event cannot be in any better position that the Insurers in respect of the application, it is appropriate to grant such permission.

The terms of the bills of lading

9. Burton J summarised the relevant provisions of the three bills of lading as follows:

> "*11. …, the Lomé Bill is on its front page headed up, in the left hand corner "Code Name: 'CONGENBILL': Edition 1978": but on the reverse page, which sets out the Conditions of Carriage, it is recorded "To be used with charter-parties Code Name 'CONGENBILL' Edition 1994". Those Conditions of Carriage recite:*
>
> > *"(1) All terms and conditions, liberties and exceptions of the Charter- Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*
> >
> > *(2) General Paramount Clause*
> >
> > *(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.*
> >
> > *(b) Trades where Hague-Visby Rules apply. . . "*

> *12. The Owendo and Takoradi Bills are in identical form. They both provide similarly in the top left hand corner of the first page by reference to the 1978 Edition and on the reverse page recite the Conditions of Carriage (by reference to the 1978 Edition). The Conditions of Carriage record:*
>
> > *"All terms and conditions, liberties and exceptions of the Charter-Party, dated as overleaf, are herewith incorporated. The Carrier shall in no case be responsible for loss of or damage to cargo arisen prior to loading and after discharging."*
>
> *The General Paramount Clause is then recited in identical terms to that set out above, and there is also a provision relating to the application of the Hague-Visby Rules, not relevant in relation to any of these three Bills.*"

10. Burton J found, at least to the standard of a good arguable case, that:

    i) despite the 'muddle' caused by the reference to different CONGENBILL editions and the absence of a signed charterparty, the Lomé bill was to be construed containing the Law and Arbitration clause set out on its reverse [16] and as referring to the (unsigned) charterparty dated 11 June 2013, which contained a London arbitration and English law clause [18];

    ii) although (as was common ground) the Owendo and Takoradi bills did not specifically provide for arbitration and therefore the question of incorporation of an arbitration clause did not arise, those bills did incorporate the other terms of the unsigned charterparty dated 11 June 2013, including the English law clause [14(ii)(a)];

11. The hearings before me proceeded on the agreed assumption that the Owendo and Takoradi bills are indeed governed by English law and that the Hague Rules are applicable as a matter of that governing law. That is in contrast to the position in the Moroccan proceedings: it is common ground that Moroccan law expressly provides that the Hamburg Rules are automatically incorporated into such contracts of carriage, ousting any contractual provision to different effect.

The relevant procedural history

12. On 15 July 2014 the claimant filed a Rebuttal Memorandum in the Moroccan proceedings, asserting that each of the three bills of lading incorporated a London arbitration clause so that the court did not have jurisdiction to hear the claim. Consequently, the claimant stated, the claim was not "*formally acceptable*". The claimant then raised a number of defences to the claim, each expressed to be "*as a precaution*". No mention was made of the fact that the claimant had commenced these proceedings in the Commercial Court in England.

13. The claimant served its Particulars of Claim in these proceedings on 7 August 2014. In contrast to the position taken in the Moroccan proceedings, the claimant did not assert that the Owendo and Takorado bills incorporated an arbitration clause, making

that assertion only in relation to the Lomé bill. On 11 August 2014 the Insurers issued an application challenging the jurisdiction of the English court.

14. At the hearing of its application for an anti-suit injunction before Burton J on 11 November 2014 (interim injunctions having been granted on an *ex parte* basis by Eder J on 2 July 2014), the claimant sought an injunction in respect of the dispute as to the cargo carried under the Lomé bill on the ground that that bill incorporated a London arbitration clause, a contention which was upheld on 24 November 2014 (for the reasons set out above) and an injunction granted. The claimant did not contend that the other two bills incorporated arbitration clauses, but instead sought an injunction to restrain the continuation of the Moroccan proceedings relating to the cargo carried under the Owendo and Takoradi bills on the ground that those proceedings were vexatious and oppressive given that (i) England was clearly the appropriate forum, a forum where the Hague Rules would be applied; (ii) Morocco, in contrast, would apply the Hamburg Rules and (iii) a parallel dispute was proceeding in London arbitration under the Lomé bill.

15. Burton J accepted that England was clearly the more appropriate forum for the disputes arising under the Owendo and Takoradi bills as English law was assumed to govern them [36], rejecting the Insurers' challenge to the English jurisdiction, but also rejected the contention that the Moroccan proceedings were vexatious or oppressive in the absence of an exclusive English jurisdiction clause, in so doing dismissing the suggestion that there is a public policy in favour of the Hague or the Hague-Visby rules which requires protection against proceedings in jurisdictions where those rules are dis-applied by local law [46].

16. The Insurers duly complied with the anti-suit injunction, withdrawing their claim in the Morocco proceedings in so far as it related to the cargo carried under the Lomé bill.

17. On 28 November 2014, with leave of Burton J, the claimant served Amended Particulars of Claim in these proceedings, adding the assertion that the claimant is discharged from liability by reason of the time-bar in Article III Rule 6 of the Hague Rules. On 23 December 2014 the Insurers, having served a fresh acknowledgment of service following the rejection of their challenge to the jurisdiction, served a Partial Defence, addressing solely the time-bar issue.

18. By application notice dated 8 January 2015 the claimant sought summary determination of its contention that its liability for cargo damage had been extinguished. That application was argued before me on 23 February 2015, following which I reserved judgment.

19. The following day the Moroccan Judgment was pronounced. The Commercial Court of Casablanca first determined that, as the Owendo and Takoradi bills of lading did not contain a special annotation providing for arbitration, the claimant could not rely on the arbitration clause in the charterparty as against parties who had acquired the bills in good faith, applying Article 22(2) of the Hamburg Rules. Having rejected the claimant's primary complaints as to the "form" of the proceedings, the Casablanca court dealt with the "substance", finding in the Insurers' favour.

20. The Insurers, by letter to this court dated 27 February 2015, asserted that the Moroccan Judgment provided a defence to the claim in these proceedings: the claimant disputed that assertion, but accepted that the existence of the Moroccan Judgment provided an arguable defence to its claim unless and until the issue of recognition of the Moroccan Judgment was determined.

21. On 6 May 2015 the claimant filed an appeal against the Moroccan Judgment, reiterating its position that the Insurers' claim should not have been "accepted" on the grounds that the Owendo and Takoradi bills incorporated arbitration clauses and, in the alternative, challenging the substantive findings of the Casablanca Commercial Court. In support of the appeal the claimant made the following incorrect statements:

    i) that the Insurers, after submitting the claim in Morocco, "*went ahead with the arbitration proceeding brought before the Supreme Court in London*" (Memorandum of appeal dated 6 May 2015);

    ii) that Burton J's judgment "*did not permit [the Insurers] to continue with [their] case in relation to these two bills before the Commercial Court in Casablanca*" (Memorandum in reply dated 3 September 2015).

22. At a further hearing in these proceedings on 27 July 2015, and in the light of further evidence served by the parties, I gave directions for the determination of a preliminary issue as to the effect of the Moroccan proceedings and the Moroccan Judgement on the claimant's claims in these proceedings, permitting the Insurers to amend their Partial Defence to set out their case in that regard and the claimant to serve a Reply.

23. Pursuant to those directions, on 14 September 2015 the Insurers amended their Partial Defence to plead that the Moroccan Judgment was a judgment of a court of competent jurisdiction, was made between the same parties as the parties to these proceedings and decided the same issues. The pleading continued:

> *"6. It is further averred that the Owners have submitted to the jurisdiction of the Casablanca Commercial Court by reason of, inter alia, the fact that:*
>
> *(a) The Owners failed to bring any challenge to the jurisdiction of the Casablanca Commercial Court in accordance with the requirements of Moroccan procedural law, and in particular failed to comply with the requirements of Article 16 of the Moroccan Code of Civil Procedure by:*
>
> *(i) Not making any challenge to the jurisdiction of the court seised prior to making any other procedural or substantive challenges;*
>
> *(ii) not identifying the court, if not the Casablanca Commercial Court, which does have jurisdiction; and/or*
>
> *(iii) not requesting that the case file be transferred to that court;*

> *(b) The only challenge which the Owners did make – that is their submission that the writ filed by the Insurers in the Casablanca Proceedings was not "formally acceptable" – constituted a procedural defence and not a jurisdictional challenge;*
>
> *(c) The Owners pleaded a substantive defence to the merits of the Insurers' claim in circumstances where this was not required by Moroccan law;*
>
> *(d) The Owners' appeal against the Casablanca Commercial Court's judgment also fails to challenge the jurisdiction of Moroccan courts but merely reiterates the procedural and substantive defences previously advanced before the first instance court and that consequently the Owners' appeal constitutes a further submission to the jurisdiction of the Moroccan courts, in addition to its submission to the jurisdiction at first instance.*
>
> *7. In the premises, the Moroccan Judgment is entitled to recognition by the English court and the Owners are consequently estopped per rem judicatam from asserting this claim against the Insurers.*"

24. In its Reply the claimant admitted that the Moroccan Judgment was between the claimant and the Insurers (taking no point that the Moroccan proceedings were expressed to be against the Master of the Vessel) and that the Moroccan Judgment determined the issue of liability for the alleged damage to the cargo, which is also an issue in these proceedings. The claimant denied, however, that the Moroccan court was a court of competent jurisdiction, rejecting the allegation that the claimant had submitted to its jurisdiction, asserting that:

    i) the proper form of challenge to the jurisdiction of the Moroccan court where a party relies on an arbitration clause is not to challenge the "competence" of the court but to challenge the "admissibility" of the claim: the claimant had raised an admissibility challenge as its first argument, in accordance with Moroccan procedural requirements. The claimant further asserted that it had no choice but to plead to the merits of the claim, as merits are determined at the same time as admissibility, but did so after and in the alternative to its challenge to jurisdiction.

    ii) its appearance in the Moroccan proceedings was to protect or obtain the release of property seized or threatened with seizure in the Moroccan proceedings, namely, the proceeds of the MBEC guarantee.

25. On 26 October 2015 the Insurers issued an application to strike out the claimant's case that it did not submit to the jurisdiction of the Moroccan courts (as summarised in paragraph 24 above) on the grounds that the first assertion was an abuse of the court's process given the stance adopted by the claimant in these proceedings and that the second assertion was not arguable.

The preliminary issue: whether the Moroccan Judgment should be recognised

(a) The scope of the argument

26. The Insurers' pleaded case, as set out above, was that the claimant had voluntarily submitted to the jurisdiction of the Moroccan courts by appearing in those proceedings (the "Third Case" of a foreign court having jurisdiction to give a judgment *in personam* identified by *Dicey, Morris & Collins, The Conflicts of Laws, 15th Ed.* ("*Dicey*") at para. 14R-054).

27. However, in her skeleton argument for the hearing of the preliminary issue, Ms Wells sought to introduce a further contention, in the alternative, that the claimant had impliedly agreed to submit disputes relating to the cargo to the Moroccan courts (the "Fourth Case" identified by *Dicey* at para. 14R-054) by agreeing to carry the cargo to Morocco. Ms Wells argued that such an agreement was to be implied from the fact that Morocco is known to be a signatory to the Hamburg Rules and that those rules provide (i) that they are applicable to a contract of carriage if, inter alia, the port of discharge is in a Contracting State (Article 2(1)) and (ii) that a claimant may institute action in the court of a State where, inter alia, the port of discharge is situated (Article 21(1)). However, this argument was not pleaded in the Amended Partial Defence and was plainly an afterthought, not least because (if the argument had any validity) it would have been a complete answer, in respect of all three bills of lading, to the claimant's application for an anti-suit injunction. The argument further appeared to be contrary to the agreed position that the Owendo and Taoradi bills of lading are subject to the Hague Rules. For those reasons, and in the absence of any application to amend, I refused Ms Wells permission to rely on this new contention.

(b) The law as to submission to a foreign court by voluntary appearance

28. It is a principle of the common law (described by *Dicey* at para 14-69 as "*simple and universally admitted*") that a litigant who has voluntarily submitted himself to the jurisdiction of the court by appearing before it cannot afterwards dispute its jurisdiction. *Briggs, Civil Jurisdiction and Judgments*, 6th Ed. ("*Briggs*") at para 7.52, explains that, as a matter of theory, a party who voluntarily appears or participates in proceedings is considered by the common law to have accepted an offer from the opposing party who commenced the proceedings to accept the jurisdiction and be bound by its judgment. The touchstone of submission on this basis is therefore consent, although the question of whether consent has been given is to be judged objectively.

29. In *Henry v Geoprosco International* [1976] QB 726 the Court of Appeal decided that, as a matter of authority (in particular *Harris v Taylor* [1915] 2 KB 580 CA), a defendant was to be taken to have submitted to the jurisdiction of a foreign court if he voluntarily appeared to invite that court in its discretion not to exercise jurisdiction it had under its own local law (p.747A). The Court of Appeal further determined that there was a voluntary appearance if the defendant protested against the jurisdiction of the foreign court, but that protest took the form of a conditional appearance which was converted automatically by operation of law into an unconditional appearance if the decision on jurisdiction went against the defendant (p.748G). The court left open the question whether an appearance solely to protest against the jurisdiction of the foreign court would be a voluntary submission to that court (p.747E).

30. The decision in *Henry v Geoprosco* was reversed by statute, in the form of s.33 of the Civil Jurisdiction and Judgments Act 1982, which provides exceptions to the common law principle in the following terms:

> ***33.- Certain steps not to amount to submission to jurisdiction of overseas court.***
>
> *(1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely-*
>
> *(a) to contest the jurisdiction of the court;*
>
> *(b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;*
>
> *(c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.*"

31. In providing that a person shall not be taken to have submitted to the jurisdiction of an overseas court by reason *only* of appearing for one of the specified purposes, s.33 left open the question of which further or other additional steps in the foreign proceedings would result in a finding that the person had, nonetheless submitted. In particular, the question arises as to when defending a case on its merits, at the same time as contesting jurisdiction, would give rise to that conclusion.

32. That question has been considered in a number of cases, all examined by the Court of Appeal in *AES Ust-Kamenogorsk Hydropower Plant LLP v AES Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 (a case in which the submission issue was not considered by the Supreme Court). It was common ground that the "general thrust" of the authorities was accurately summarised in *Dicey* at para. 14-073 as follows:

> "*… for so long as the defendant asserted, and is obviously still asserting, as his primary defence that the court has no jurisdiction over him in relation to the merits of the claim, then even if he also takes steps which are purposeful in relation to the merits of the claim, his doing so should not be taken to mean that he has submitted to the jurisdiction for the purposes of the common law of submission, and has abandoned his challenge for the purposes of s.33. The real question for the English court should not be whether the defendant has taken a step in proceedings which prepare for the trial of the merits, but whether he has chosen to abandon his challenge to the jurisdiction. In answering this, the English court is not bound*

> *to follow the law of the foreign court on whether a defendant has succumbed to its jurisdiction; and if the defendant had "no real option but to act as it did", as it was put in AES Ust-Kamenogorsk Hydropower Plant LLP v AES Ust-Kamenogorsk Hydropower Plant JSC, the court may be reluctant to find that it has submitted to the jurisdiction.*"

33. In *Rubin v Eurofinance SA* [2013] 1 AC 283 the Supreme Court confirmed that the characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. Lord Collins explained at [161] that:

> "*The court will not simply consider whether the steps taken abroad amounted to submission in the English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English courts as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts.*"

(c) Whether the claimant submitted in Morocco notwithstanding s.33(1)(b)

34. Ms Wells accepted that the claimant's stance in the Moroccan proceedings was to ask the Moroccan court to dismiss or stay the proceedings in favour of arbitration, therefore falling within the exception contained in s.33(1)(b).

35. The Insurers advanced two argument as to why the claimant nevertheless should be taken to have submitted to the jurisdiction of the Moroccan courts:

i) the contention pleaded in the Amended Partial Defence that the claimant's case in the Moroccan proceedings that the dispute should be referred to arbitration was a "procedural defence" and not a jurisdictional challenge, resulting in the claimant pleading a substantive case on the merits in Morocco when it did not have to;

ii) the contention (not pleaded but advanced by way of the application to strike out) that it is an abuse of process for the claimant to rely on its case in Morocco as to the incorporation of arbitration clauses given its stance in these proceedings.

36. Ms Wells positioned the abuse of process argument as her primary contention, no doubt due to the difficulties facing the Insurers' pleaded case as discussed below. However, I agree with Mr Collett that, as a matter of logic, the first question is whether or not the claimant submitted to the Moroccan court despite and in the context of contending that the dispute should be referred to arbitration. The question

of whether it is an abuse of process to rely on that contention in the present context only arises if the answer to the first question is that the claimant did not submit.

(i) The claimant's stance in the Moroccan proceedings

37. Each party served evidence from an expert in Moroccan law and procedure. The Insurers relied on reports from Professor Mounir Tabite, the claimant on a report from Me Kamal Saïgh.

38. The experts were broadly in agreement on the following:

i) Moroccan law distinguishes between "jurisdiction" challenges and "admissibility" challenges;

ii) Jurisdiction challenges relate to a lack of subject-matter or territorial jurisdiction and are governed by articles 16 and 17 of the Civil Procedure Code ("the CPC"). A party bringing such a challenge must indicate which court is competent and request that the file be sent to that court: it is not possible to request transfer to an arbitral tribunal. A jurisdiction challenge must be decided separately and can be appealed, so that a party can make such a challenge without dealing with the substantive merits of the claim;

iii) Admissibility challenges do not relate to the competence of the court to deal with the matter, but to the right of the opposing party to bring the claim, governed by article 49 of the CPC. The court decides issues of admissibility and the merits in the same judgment, so an admissibility challenge cannot, in practice, be made without also engaging on the merits;

iv) A challenge to the admissibility of a claim may be made by relying on an arbitration agreement. Indeed, article 327 of the CPC, dealing with domestic arbitration agreements, provides that a state court must pronounce a claim brought in breach of such an agreement to be inadmissible.

v) The claimant's reliance on the alleged incorporation of arbitration clauses in the bills of lading in the Moroccan proceedings was a challenge to the admissibility of the claim and was dealt with as such by the Casablanca Commercial Court.

39. The one area of disagreement arose from Professor Tabite's suggestion that a challenge based on an international arbitration agreement (as opposed to a domestic agreement falling within article 327 of the CPC) could be made by way of either a jurisdictional challenge or an admissibility challenge and that, as a matter of Moroccan law, a party who opted for an admissibility challenge would be deemed to have submitted to the jurisdiction of the Moroccan courts.

40. Based on that suggestion, the Insurers contended that the claimant, in electing to make an admissibility challenge rather than challenging jurisdiction, should be taken to have submitted to the jurisdiction of the Moroccan courts, in particular because the clamant had voluntarily selected a course which entailed submitting a defence to the substantive merits when it need not have done so had it chosen to challenge jurisdiction.

41. However, it is difficult to reconcile Professor Tabite's suggestion with his clear explanation that article 16 of the CPC requires a party making a jurisdiction challenge to specify the court (which does not include an arbitral tribunal) to which the case should be transferred. Indeed, even in the context of making his suggestion, Professor Tabite emphasises that the jurisdictional challenge he envisages would be subject to fulfilling the requirements of article 16, a condition which simply could not be satisfied on his own evidence.

42. I therefore prefer Me Saïgh's clear and consistent evidence that a challenge based on an arbitration agreement can only be brought by way of an admissibility challenge, even in relation to international arbitration agreements (which Me Saïgh explains would be governed by Article II paragraph 3 of the New York Convention to which Morocco is a signatory). Indeed, Me Saïgh cited several decisions of the Commercial Court of Appeal, dealing with international arbitration agreements, which expressly state that challenges based on arbitration agreements are submissions as to "non-acceptance".

43. It follows that the claimant was not only obviously and primarily asking the Moroccan court (at first instance and on appeal) to dismiss the proceedings on the ground that the dispute should be submitted to arbitration (within the meaning of s.33(1)(b)), but did so by the only route open to it, a route which necessitated serving a defence on the merits in the alternative if that defence was to be preserved. In those circumstances it is impossible to view the claimant's actions in Morocco as amounting to a choice to abandon such challenge or otherwise to succumb to the jurisdiction of the Moroccan courts.

44. Even if, contrary to my finding above, it was possible for the claimant to mount a jurisdictional challenge instead of an admissibility challenge in Morocco (and even if that amounted to submission as a matter of Moroccan law), I am satisfied that the claimant did not, from an English law perspective, abandon its challenge or succumb to the jurisdiction of the Moroccan courts. The course the claimant took was an appropriate course (one regarded by a respectable body of Moroccan lawyers as the only one open to it) for a party seeking to have a dispute referred to arbitration. Throughout that course the claimant's objection based on the alleged incorporation of arbitration clauses was its primary contention, and was never abandoned.

45. Ms Wells contended (although the point was not pleaded) that, notwithstanding the above findings, I could take into account other relevant factors, and exercise a degree of discretion, in considering whether the claimant had submitted in Morocco. She submitted that the following were relevant factors which should lead me to reach the conclusion that the claimant had so submitted:

    i) that the claimant's contention in Morocco that arbitration clauses were incorporated in the Owendo and Takoradi bills of lading was not rational;

    ii) that that contention was fundamentally inconsistent with the fact that the claimant had already initiated these proceedings (and not arbitration), rendering the contention unconscionable;

    iii) that the claimant did not contest the Moroccan proceedings under article 16 of the CPC on the grounds that the dispute should be heard in England.

46. Whilst it is true that the question of whether a party has submitted is to be inferred from all the facts (see para. 33 above), there is no basis, in my judgment for regarding the determination of that issue as involving an element of discretion. The court has to make a determination as to whether the party has voluntarily appeared in the foreign court (other than as specified in s.33(1)), a question of mixed law and fact to which there is a single answer, not exercise its discretion as between a range of permissible answers. In the present case, having found that the claimant brought a primary challenge which falls within s.33(1)(b) and had no choice but to defend the merits of the case at the same time, the clear inference to be drawn from all the facts is that the claimant did not submit in Morocco. As for the points on which Ms Wells relies:

    i) *Dicey* suggests (in footnote 280 to the passage from para. 14-073 set out above) that it is "*perhaps*" an additional requirement that a jurisdiction challenge is rational, but provides no authority for that proposition. Whilst it may be that in an extreme cases where a challenge is so obviously absurd (in the context of the applicable foreign law and procedural rules) that the English court might conclude that the party advancing it has in reality submitted, the mere fact that a challenge might be classed as obviously wrong or even irrational would not in itself justify appear to justify a conclusion that its proponent had chosen to submit. But in any event, there is no basis for an argument based on irrationality in the present case. Me Saïgh set out a detailed justification for the claimant's arguments as to the incorporation of the arbitration clauses as a matter of Moroccan law (notwithstanding the provisions of the Hamburg Convention), arguments which Professor Tabite did not address in his reply, let alone demonstrate to be irrational.

    ii) *Briggs*, at para 7.53, suggests that one reading of the decision of the Supreme Court in *Rubin* (holding that a party had submitted to the insolvency jurisdiction of the Australian courts by lodging a claim for payment in the administration) would have the effect that a party may be held to have submitted if it would be unconscionable for him to plead that he had not submitted to the jurisdiction of the foreign court. Whether or not that is the true result (and *Briggs* both doubts it and points out that it would lead to uncertainty), it is clear that the focus is on the position adopted in the foreign court (or broader foreign proceedings) in determining whether there has been a submission in that foreign jurisdiction, not on any inconsistent conduct in England. There is no support in the cases or as a matter of logic for Ms Wells' contention that a party may be held to have submitted in a foreign jurisdiction because of actions in this jurisdiction.

    iii) It may be that the claimant could have mounted a prior jurisdictional challenge under article 16 of the CPC on the basis that the dispute should be tried in England, but there was no evidence adduced in that regard. Even if such a challenge could have been made, its availability does not, in my judgment, have any bearing on the question of whether the claimant's admissibility challenge resulted in the claimant submitting.

47. I therefore find that the claimant, having requested the dismissal of the claim in Morocco in favour of arbitration proceedings and having done so continually and as its primary response, did not voluntarily appear in the Moroccan courts. I turn to the question of whether the claimant should nonetheless be held to have submitted in

Morocco on the ground that its reliance for the purposes of the present preliminary issue on its admissibility challenge in Morocco is an abuse of the process of this court.

(ii) The alleged abuse of process

48. Ms Wells does not contend that the claimant is estopped from relying on its admissibility challenge in Morocco, nor does she contend that the claimant is bound by some form of election. Her argument is that the claimant's position is an example of impermissible approbation and reprobation, or "blowing hot and cold". The complaint is that the claimant commenced these proceedings in England (not suggesting that the Owendo and Takoradi bills of lading incorporated arbitration clauses), took an inconsistent position in Morocco that the dispute should be referred to arbitration and is now seeking to pursue these proceedings by relying on its inconsistent stance in Morocco.

49. Ms Wells draws the principle upon which she relies from *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320, in which a plaintiff was not permitted to defend a counterclaim which was legally indistinguishable from the plaintiff's own claim, to which the plaintiff had said there was no defence. Brown-Wilkinson VC stated:

> "*There is a principle of law of general application that it is not possible to approbate and reprobate. That means that you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance …..*"

50. The second case relied upon was *Benedictus v Jalaram Ltd* (1988) 58 P&CR 330, in which a tenant, having made an application for a new tenancy predicated on being in occupation of the premises, subsequently resisted the landlord's application for interim rent on the basis that he was not in occupation. The Court of Appeal upheld the striking out of the tenant's response on the basis that it was an abuse. Bingham LJ stated:

> *"… We were referred to various textbook passages on election or remedies, waiver and approbation and reprobation. I do not think the present case falls within the letter of any of these doctrines or maxims but each of the doctrines or maxims reflects the unwillingness of the courts to countenance inconsistent conduct by one party where this is prejudicial to the other. It is further to be remembered that in the present case we are concerned not with statements made in the course of commercial dealing or negotiation but formal statements made in the course of invoking the court's jurisdiction, statements which Jalaram now wish to say were false. It seems to me, as the judge, that whether the rule is founded on public policy or justice between the parties this cannot be permitted.*"

51. However, *Express Newspapers* and *Benedictus* are extreme examples of a party adopting diametrically opposite positions within one set of English proceedings, the

court refusing to countenance such conduct. The position in the present case is very different for the following reasons:

i) Although the claimant commended proceedings in this jurisdiction and has not contended (as a matter of the applicable English law) that the Ownedo and Takoradi bills incorporate an arbitration clause, it has at no time pleaded or positively asserted that those bills do not incorporate such clause, nor that the dispute should not be referred to arbitration.

ii) Indeed, the commencement of English proceedings is not in itself inconsistent with the existence of an arbitration agreement governing the relevant dispute.

iii) The claimant's contention that the Owendo and Takoradi bills did incorporate arbitration clauses was raised as a matter of Moroccan law in the Moroccan proceedings. It is not inconsistent to argue a point as a matter of foreign law whilst recognising (in parallel proceedings) that it would not succeed as a matter of English law.

iv) Further, in order to demonstrate it was not seeking an inconsistent outcome (that is, the dismissal of the Moroccan proceedings in favour of London arbitration but continuing these proceedings rather than arbitrating), the claimant offered an undertaking to this court that it would submit to London arbitration (but on the basis that it would continue to take the time-bar point under the Hague Rules).

52. It follows, in my judgment, that whilst there is a degree of tension between the claimant's stance in these proceedings and its position in the Morocco proceedings, it is the type of situation which can arise where disputes are pursued in parallel proceedings in different jurisdictions and governed by different laws. It is certainly not the type of blatant inconsistency which would cause the court to prevent a party from relying on the position it has undoubtedly and properly adopted in foreign proceedings.

(d) Whether the claimant submitted in Morocco notwithstanding s.33(1)(c)

53. The claimant further contended that its participation in the Moroccan proceedings was, in any event, to protect or obtain the release of property seized in the proceedings, namely, the MBEC guarantee (which stood in place of the Vessel). In view of my finding above the claimant's participation in the Moroccan proceedings did not amount to a submission to that jurisdiction, and as Mr Collett accepted that this point was not at the "forefront" of his case, it is neither necessary nor appropriate for me to decide this further contention.

The application for summary judgment

54. The fourth paragraph of Article III r.6 of the Hague Rules provides as follows:

> "*In any event the carrier and the ship shall be discharged from all liability in respect of all loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.*"

55. It is common ground that the relevant date by which the goods should have been delivered was a date not before the end of August 2013, so that the one year time bar (which extinguishes the claim rather than merely barring the remedy: see *Aries Tanker v. Total Transport Ltd* [1977] 1 WLR 185 HL) arose not before the end of August 2014. Both the Moroccan proceedings and these proceedings had been commenced before that date. The question is whether either of those proceedings constitutes "suit" within the meaning of Article III r.6.

(a) The law relating to Article III r. 6

56. Article III r. 6 is to be given a broad and purposive construction: *The Amazona* [1989] 2 Lloyd's Rep 130 CA per Parker LJ at 136, *The Finnrose* [1994] 1 Lloyd's Rep 559 per Rix J at 574.

57. The purpose of the time-bar has been explained in numerous authorities, including as follows:

i) In *Compania Columbiana de Seguros v Pacific Steam Navigation Co* [1963] 1 QB 101 Roskill J stated at p.123C that "*… the crucial paragraph in the rule occurs in a rule the whole purpose of which … is to protect shipowners from being subjected to claims for loss of or damage to cargo which have not been promptly made an promptly pursued.*"

ii) In *The Aries* (above) Lord Wilberforce, at p.188G, added to his analysis of Article III r.6 that "*to provide for the discharge of these claims after 12 months meets an obvious commercial need, namely, to allow shipowners, after that period, to clear their books.*"

iii) In *The Leni* [1992] 2 Lloyd's Rep 48 HHJ Diamond QC considered the time-bar in the context of rule 6 as a whole and the Hague Rules as a whole, stating at p.53 1st column:

> "*The purpose of the Hague Rules was to achieve a balanced compromise between the interests of cargo-owners and the interests of the carriers. There were a number of objectives which art. III r.6 sought to achieve; first, to speed up the settlement of claims and to provide carriers with some protection against stale and therefore unverifiable claims; second, to achieve international uniformity in relation to prescription periods; third, to prevent carriers from relying on 'notice-of-claim' provisions as an absolute bar to proceedings or from inserting clauses in their bills of lading requiring proceedings to be issued within short periods of less than one year…* "

iv) In *The Finnrose* [1994] 1 Lloyd's Rep 559 Rix J expressed the view that the issue of a writ which was never served would not constitute suit, stating at p574: "*to permit fresh proceedings … runs counter to the whole purpose of the rule, which is to ensure speedy notification of claims and the prompt pursuit of litigation …*"

v) In *The Pionier* [1995] 1 Lloyd's Rep 223 Phillips J stated, at p.227;

> "*The object of the Hague Rules time limit is to protect shipowners from stale claims. Provided that a suit is brought by the party entitled to sue before a competent Court which alleges that the ship owner is liable for breach of duty owed in relation to the cargo carried it seems to me that the suit will suffice to satisfy the requirements of the Hague Rules.*"

58. It is now recognised that proceedings in a foreign court may constitute valid suit for the purposes of Article III r.6, provided that the court is "competent". In *The Nordglimt* [1988] 1 QB 183 Hobhouse J, following the provisional view of the Court of Appeal in *The Kapetan Markos NL* [1986] 1 Lloyd's Rep 211, held that proceedings before a competent court were sufficient to prevent the liability of the carrier being discharged at the end of the one year period. Accordingly English proceedings *in rem* were not barred by the time-bar because proceedings had been commenced *in personam* in Antwerp within the one year period. That reasoning was approved by Parker LJ in *The Amazona* (above).

59. Subsequent cases have identified several situations in which a foreign court will not be considered to be competent, but those all relate to the jurisdiction of the court in the context of the relationship and conduct of the parties, not the intrinsic competence of the court. For example, proceedings brought in breach of an exclusive jurisdiction clause (*The Havhelt* [1993] 1 Lloyd's Rep 243), proceedings brought in breach of an arbitration agreement (*Thyssen v Calypso* [2000] 2 Lloyd's Rep 243) and proceedings which, although initially competent, were struck out for want of prosecution (*The Finnrose* (above)) have been held not to count as valid suits.

(b) Whether the Moroccan proceedings constituted valid suit

60. Mr Collett did not dispute that the Moroccan court had jurisdiction to deal with the Insurers' claim and that there was no impediment to the competence of that court of the nature recognised in previous decisions. Nor did he dispute that those proceedings fulfilled the purpose of the time-bar identified in the authorities referred to above, that is to say, ensuring that the cargo claim against the claimant was pursued promptly within 12 months and was not allowed to become stale.

61. However, Mr Collett contended that there is a wider purpose behind the time-bar, which has not yet been addressed in the cases or text books, which requires that foreign proceedings should not be regarded being brought in a competent court if they were commenced in a jurisdiction (such as Morocco) which applied the Hamburg Rules rather than the Hague rules. The argument was as follows:

i) The Hague Rules represent a compromise between the interests of cargo-owners and carriers under which carriers accepted (unless otherwise agreed) specified obligations and liabilities, subject to specified restrictions, including the time-bar: see *The Leni* (above) at 52-53.

ii) That compromise would be undermined if proceedings could be brought in a jurisdiction which applied the Hamburg Rules which, Mr Collett asserted (but Ms Wells disputed) are more beneficial to the cargo owners.

iii) Therefore the term "suit" in Article III r.6 must be read as meaning "suit to establish liability under the Hague Rules". Mr Collett, whilst recognising that *The Kapetan Markos NL* (above) pre-dates the Hamburg rules, prays in aid the following dictum of Parker LJ at p.232 of that decision:

> *""Discharged from all liability" must mean discharged from all liability under the rules. "Unless suit is brought" must therefore mean unless suit is brought to establish liability under the rules"*

62. However, in my judgment Mr Collett's argument overreaches by a considerable margin. The fact that parties have agreed to apply the Hague Rules evidently does not entail that they have agreed that no proceedings will be brought in a state which applies the Hamburg Rules (and Mr Collett has not suggested that it does: such an agreement would have founded a clear entitlement to an anti-suit injunction). Further, Burton J, at [46], rejected the claimant's contention that commencing proceedings in a Hamburg Rules jurisdiction in such circumstances would be contrary to English public policy or otherwise be regarded as unconscionable conduct. Yet Mr Collett's proposed interpretation of Article III r.6 is based on the hypothesis that proceedings in a Hamburg State should be discounted by the English court applying the Hague Rules (and in particular the time-bar in Article III r.6), giving rise to an entitlement to a declaration of non-liability and thereafter, no doubt, an anti-suit injunction. It is unclear why a simple-time bar provision should be read as giving rise to draconian consequences not otherwise arising a matter of the rules or the general law, and I see no reason why it should. The true purposes of the rule have been clearly stated in the authorities referred to above and do not include requiring proceedings to be brought under the Hague Rules. In my judgment Mr Collett's argument, whilst ingenious, is a flawed attempt to re-open, in a different guise, the contention roundly rejected by Burton J at [46] of his judgment.

(c) Whether the claimant's claim in these proceedings constituted valid suit

63. As I have found above that the Insurers did bring valid suit within one year for the purposes of Article III r.6 in the form of the Moroccan proceedings, it is not strictly necessary for me to decide the further question of whether the claimant's claim for a negative declaration in these proceedings also constituted valid suit for that purpose. For the sake of completeness, however, I shall briefly set out my view on that further question.

64. Although there is no direct authority on the point, all of the cases proceed on the assumption that the suit contemplated by Article III r.6 is one brought against the shipowner, alleging liability for breach of duty in relation to the cargo: see in particular the citations from *The Pionier* and *The Kapetan Markos NL* set out above.

65. Ms Wells nevertheless contended that there is nothing in the wording of the rule itself which requires that the suit be brought against the carrier and that the purpose of the rule is equally fulfilled by a claim initiated by the carrier seeking to establish non-liability: the dispute is brought to court promptly and the carrier is able to ascertain its liability and avoid exposure to stale claims. Ms Wells also referred to the following:

i) The dictum of HJ Diamond QC in *The Leni* (above) to the effect that the carrier would equally be put in notice of the claim irrespective of the identity of the party initiating the steps under Article III r.6. However, Judge Diamond was considering a situation where the wrong person sued the carrier, not a claim by the carrier for a declaration of non-liability.

ii) The decision of the ECJ in *The Tatry* [1999] QB 515, concluding at p.535 that an action by carriers seeking a declaration of non-liability for cargo damage had the same object as a subsequent claim by cargo owners against the carrier for damages for causing the loss.

66. However, the nature and operation of a time-bar is well understood. Such a time bar (or limitation period) provides a party alleged to be liable with a defence to the cause of action asserted against him (or extinguishes the cause of action altogether) if the proceedings have not been brought within a specified period. There is no reason to read Article III r. 6 as operating in a different way: the reference to the carrier being discharged from all liability unless suit is brought is, in my judgment, plainly specifying a period in which claims against the carrier must be commenced. I do not consider that the fact that a claim for a declaration of non-liability has the same 'object' as a claim alleging such liability entails that either claim will sufficient to stop time running in respect of the latter.

67. It follows that, had the issue required a decision, I would not have found that the claimant's claim in these proceedings constituted valid suit for the purposes of Article III r.6.

Conclusion

68. For the reasons set out above:

i) The preliminary issue is determined in favour of the claimant: the Moroccan Judgment is not entitled to recognition in this jurisdiction as the claimant did not submit to the jurisdiction of the Moroccan courts.

ii) However, the claimant is not entitled to summary judgment on its claim as the Moroccan proceedings did constitute valid suit brought within one year for the purposes of Article III r.6 of the Hague Rules, so that the claimant is not thereby discharged from any liability to the Insurers.