IN THE HIGH COURT OF JUSTICE No. CL-2020-000480

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

[2020] EWHC 3645 (Comm)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Friday, 28 August 2020

Before:

THE HON. MR JUSTICE BRYAN

B E T W E E N :

ULUSOY DENIZILIK A.S.

Claimant

- and -

COFCO GLOBAL HARVEST (ZHANGJIAGANG) TRADING CO. LTD

Defendant

GEMMA MORGAN (instructed by Mills & Co) appeared on behalf of the Claimant.

DOMINIC HAPPÉ (instructed by Clyde & Co) appeared on behalf of Defendant.

J U D G M E N T

MR JUSTICE BRYAN:

INTRODUCTION AND OVERVIEW

1 The parties appear before the Court today on the Claimant's *inter partes* application for a final anti-suit injunction restraining the Defendant from commencing and/or continuing proceedings in any Chinese Court or tribunal, or elsewhere, in breach, it is said, of an arbitration agreement in the applicable contract of carriage pursuant to the power of this Court under s.37(1) of the Senior Courts Act, the claimant having previously obtained permission to serve the arbitration Claim Form and the application, and all other relevant documents in these proceedings, on the Defendant out of the jurisdiction in China pursuant to CPR 62.5(1)(b) and/or (c), and/or CPR 6.36 and 6BPD3, and/or by an alternative method under CPR 6.1(5), such permission having been obtained on paper from Jacobs J.

2 Jacobs J ordered an expedited timetable leading to the present hearing due to the urgency that arises in relation to the application for an injunction when set against the backdrop of the impending Chinese proceedings commenced by the Defendant against the Claimant. Although the Defendant filed an Acknowledgment of Service indicating not only an intention to defend the proceedings but also to contest the jurisdiction.

3 In the event Clyde & Co. accepted service of the proceedings on behalf of the Defendant and no separate issues are taken on behalf of the Defendant in relation to jurisdiction, the issues between the parties essentially being threefold:

(1) Whether there is a binding arbitration agreement between the Claimant and the Defendant under a contract of carriage governed by English law in favour of London Arbitration;

(2) If so whether the contract of carriage has either been varied to effect that, or the Claimant is estopped from denying that the Claimant has agreed to the Defendant's cargo claim taking place in the Chinese courts as a result of the terms of a Letter of Indemnity given in favour of the Defendant, such that the Defendant is not in breach of the terms of the contract of carriage in commencing the proceedings in China;

(3) Whether in all the circumstances it is appropriate to grant an anti-suit injunction and if so whether that should be final or interlocutory.

4 The application is supported by the First, Second and Third statements of Jonathan Green of Mills & Co., the Claimant's solicitors, and the application is opposed in the statement of J Sharma of Clyde & Co., the Defendant's solicitors. I have had full and careful regard to the contents of those statements and the matters and materials exhibited thereto.

BACKGROUND AND COMMERCIAL CONTEXT

5 The claimant is the head owner of the Motor Vessel "ULUSOY-11" (the "Vessel"), who I shall refer to hereafter interchangeably as either "the Owners" or "the Claimant".

6 On 26 June 2018 the Owners time chartered the Vessel to Smart Grain Shipping Co. Limited ("Charterers") on an amended NYPE form (amended/directly continued pursuant to two addendums dated 27 July 2019 and 2 October 2019) ("the Head-Charter"). The Charterers sub-chartered the vessel to COFCO International Freight SA ("Sub-Charterers") for a time charter trip from Brazil to China ("the Sub-Charter") pursuant to a charterparty dated 28 February 2020.

7 At the time of Mr Green's first witness statement a redacted copy provided to Mills & Co. in that redacted form by the P&I Club acting on the Sub-Charterer's behalf of the Sub-Charter was exhibited. The evidence of Mr Green in that first witness statement was that his firm had been informed by the Sub-Charterer's P&I Club that there were no further charterparties in the chain. That was confirmed in a subsequent witness statement from a Glenn Winter, a senior partner of the well-known shipping firm Winter Scott LLP, who acts on behalf of the charterers, Smart Grain, and who has possession of, and states he has carefully reviewed, an unredacted copy of the Sub-Charter. His statement, which is dated 26 August, is supported by a statement of truth, and is a statement made by a solicitor of the Senior Courts with very considerable experience of English maritime law.

8 If matters had rested there, I would have seen no reason not to accept what is stated by him in evidence. Certainly, there was nothing relied upon by the Defendant which contradicts what he states. However, even more recently, and very shortly before this hearing, an unredacted copy has now been supplied, which, as I shall come onto, corroborates what is stated by Mr Winter as recounted by Mr Green. I take the summary that follows as to events from the evidence of Mr Green in his first witness statement. Whilst issues may arise in due course, in the context of the underlying cargo claim, it is a convenient summary of the backdrop to the cargo claim.

9 In early April 2020 the vessel loaded a consignment of Brazilian soya beans in bulk (the "Cargo") totalling 67,707.485 metric tons from Barcarena, Brazil, for carriage to Longkou, China, where the Cargo was discharged. The Owners issued five separate bills of lading dated 3 April 2020 in respect of the Cargo ("the Bills of Lading"). Bills of Lading numbered 1 and 2 named COFCO International Brasil SA as shippers, Bill of Lading number 3 named COFCO International Grains LTDA as Shipper, Bill of Lading number 4 named Gavilon do Brasil Comercio de Produtos Agricolas LTDA a shipper, and Bill of Lading number 5 named an entity that I shall refer to as Novaagri as shipper (together the "Shippers").

10 The notify party on all five of the Bills of Lading is the Defendant, who are also the receivers of the cargo under the Bills of Lading "COFCO Global Harvest Zhangjiagang Trading Co. Limited, Unit 403, COFCO, East Ocean Building, Guangxi Chemical Industrial Park, Jiangsu Province, China".

11 The vessel arrived at Barcarena Port, Brazil on 17 March 2020 and tendered Notice of Readiness at 15:50 hours local time. The Vessel berthed on 31 March 2020, cargo inspections took place, and the holds were passed without comment from the inspectors. Loading commenced on 31 March 2020 at 16:05 without concern, and completed on 3 April 2020, following which the Vessel sailed for China. On completion of loading the cargo was fumigated. From 13 April onwards, being the first day after the fumigation period, the holds were ventilated between 08:00 and 16:00 hours local time daily, save for seven days when ventilation was not possible due to rain or heavy weather. The Vessel arrived at Longkou, China, tendered NOR on 26 May 2020, and began to discharge. Discharge completed on 4 June 2020 and the Vessel sailed later that same day. During discharge the Defendant allegedly found that parts of the cargo were heat damaged.

12 The Defendant's Chinese lawyers, Liuyan Law Firm, sent an e-mail to the Owners' P&I Club, who are the "Standard Club", on 27 May 2020 alleging that the soya beans were found caked and heat damaged, allegedly with the worst damage being found in hold number 7. The Defendant also sent a letter addressed to the Owners informing them of the alleged cargo damage on 27 May 2020. Since then cargo sampling has been ongoing and testing is being arranged. The extent of the alleged damage is currently unknown.

SECURITY AND THE LETTER OF UNDERTAKING

13 The Defendant applied to the Qingdao Maritime Court (the "Chinese Court") to arrest the Vessel during the cargo discharge as security for its claims under the Bills of Lading. In order to obtain the release of the vessel from arrest in China the Standard Club, (as Owners' P&I Club), had put up security in the sum of U$5 million, which was, in the event, given to China Re. However, a letter of indemnity from the Standard Club was not acceptable to the receivers, and so it was agreed that the Standard Club would provide the security to China Re Insurance Group Corporation under an LOU governed by Chinese law, and that China Re would then issue an LOU to the Defendant (the "Security").

14 The Letter of Undertaking issued to the Defendant, in turn by China Re Insurance Group Corporation (the LOU), is in the amount of U$5 million. The LOU provides for Chinese law and jurisdiction in respect of any dispute arising from the Security. It will be necessary to return to the terms of the LOU in more detail in due course below given the issues that have since arisen as to its terms and its alleged significance. However, at this stage it suffices to note that following provision of the LOU the arrest was lifted by the Chinese court on 2 June 2020.

THE TERMS OF THE CONTRACT OF CARRIAGE – THE ALLEGED AGREEMENT TO ARBITRATE IN LONDON PURSUANT TO ENGLISH LAW

15 The front of all five bills of lading provides "Freight payable as per governing charter party" and "For conditions of carriage see overleaf". The bills were on the Congen Form. On the reverse side, clause 1 of all five bills of lading provides as follows:

> "All terms and conditions, liberties and exceptions of the charter party dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

16 An issue that arises is as to what "the Governing Charter Party" is in relation to the contract of carriage given that the Charterparty is not expressly named in the Bills of Lading. This is a familiar and common occurrence in relation to Bill of Lading contracts of carriage, and the applicable principles to be applied in determining the charterparty that is being referred to are well established as a matter of English law, if English law governs the question of incorporation.

17 There are two candidates for the "Governing Charterparty" referred to in the Bills of Lading: the Head-Charter and the Sub-Charter. The issue is only of any potential significance because, at least initially, the Defendant denied that the terms of the Sub-Charter were clear given the extent of the redactions that were in the version before the Court at the time of Mr Green's first statement. For its part, the Owners submitted that the terms of the Sub-Charter are clear, and that in terms of determining the applicable law and jurisdictional regime in the Bills of Lading both charters incorporate English law and London Arbitration provisions.

18 The Defendant's submission in this regard has, in my view, been fatally undermined by two developments during the course of the lead up to the application. The first was as a result of the evidence of Mr Winter, who is in possession of and has considered an unredacted copy of the sub-charter, and even more recently, as I have already foreshadowed, an unredacted copy of the Sub-Charter has now been obtained.

19 So far as the Head-Charter is concerned, clause 69(a) of the Head-Charter provides:

"Clause 69-Arbitration:
(a) This contract is governed by and construed in accordance with English law. Any dispute arising out of or in connection with this charter party shall be referred to arbitration in London."

20 In relation to the Sub-Charter, the recap at Clause 13 governing law provides: "This contract shall be governed by English law – GA/Arbitration to be held in London." It attached an amended NYPE form 1947. Clause 17 provides: "Should any dispute arise between the owners and the charterers see clause 69", and it also provided clauses 29 to 120, both inclusive, as attached hereto, are deemed to be fully incorporated in this charter. Clause 69 then follows in identical terms to that in the Head-Charter (which is itself perhaps unsurprising for a trip time charter carved out of a time charter).

21 As I say, in light of the Defendant's denial that the terms of the Sub-Charter were clear, given the extent of the redactions in the version before the Court, and that other clauses could impact upon the Law and Arbitration provisions, Mr Winter, who is acting on behalf of the Charterers, Smart Grain, was asked to review the fixture recap and the charterparty terms that make up the Sub-Charter, and confirm whether the Sub-Charter contains any other clauses which may affect or vary the printed terms of the law and jurisdiction clauses as set out in the redacted copy of the Sub-Charter party previously provided to Head Owners. He stated at para.8 of his statement, which was supported by a statement that: "I believe that the facts stated in this witness statement are true" as follows:

> "I confirm that I carefully reviewed the sub-charter party and that there is nothing in the unredacted copy of the sub-charter party provided to me by (inaudible) which would, in my opinion, affect or vary the terms of the printed terms of the law and jurisdiction clauses subject to the following minor points".

Neither of the points that were then made impacts upon the application of the terms of clause 69(a).

22 I would have accepted Mr Winter's evidence and would have been satisfied on the evidence before me, that the Claimant had established that in fact the Sub-Charter does indeed provide for English law and London Arbitration if the evidence had rested there. I would also have added two further points, which would have been independent of Mr Winter's evidence and would have further bolstered such a conclusion. The first is that, as the Claimant submitted, it is inherently probable, in my view, in the circumstances of a time charter for a single trip, that its material terms, in particular as to dispute resolution, would be back-to- back with the Head-Charter, as is entirely standard in the industry.

23 Secondly, and whilst the burden is on the Claimant to establish the existence of an agreement to arbitrate in London, the Defendant had put forward no evidence to counter the evidence that was before me, nor to suggest that any other agreement to jurisdiction or arbitration was made by the parties to the Sub-Charter. The only evidence before me then was that the Sub-Charter is subject to English law and London Arbitration.

24 The position was, at least at the time of Mr Green's first and second witness statements, that the Claimant repeatedly attempted to obtain an unredacted copy of the Sub-Charter from the Sub-Charterers and/or their P&I Club (Skuld) and their legal representatives, and there was, in contrast, no evidence before me, that the Defendant at any time made any such attempt

despite the fact that it appears that Sub-Charterers are also, like the Defendant, a COFCO company. One would have thought, therefore, that the Defendant, out of anyone between the Defendant and the Claimant, was best placed, or at least better placed, to obtain a copy of the Sub-Charter and would therefore have relied upon its terms, had there been any terms contradicting the terms as to English law and jurisdiction.

25 Happily, however, and as I have already identified, very shortly before the hearing the Sub-Charterer agreed to release an unredacted copy of the Charterparty, save as to hire, that is the Sub-Charter, which was then yesterday exhibited to a third witness statement of Mr Green and which corroborates what was stated by Mr Winter. Having considered that Sub-Charter myself, I am satisfied, as was Mr Winter before me, but in my case as the judge determining the matter, that there is nothing in the unredacted Sub-Charter which impacts upon the Law and Arbitration provisions, and that unredacted version that has finally been released does indeed corroborate the evidence of both Mr Green and Mr Winter.

THE LAW GOVERNING THE QUESTION OF INCORPORATION

26 The first issue that arises is as to which law governs the question of incorporation. Art. 10(1) of the Rome I Regulation (Regulation EC No. 593/2008) provides that the material validity of a contract is to be decided pursuant to the law which would govern it if the contract or the terms therein were valid. The material term here is the incorporated Law/Arbitration Clause, as asserted by the Claimant, in either the Head or the Sub-Charter. The law that governs that question incorporation is accordingly English law (see also Art. 3 in that regard).

27 However, the Defendant seeks to rely upon the exception in Art. 10(2). A party may rely upon the law of the country in which it has its habitual reference "if it appears from the circumstances that it would not be reasonable to determine the effect of its conduct in accordance with the law specified in para.1". On this basis, and as identified by Mr Happé on behalf of the Defendant, the party opposing the application of the putative applicable law needs to establish that, (1) it is unreasonable to apply the putative applicable law to the issue of the contract formation; (2) they have not consented to be bound by a contract (here the agreement to arbitrate in this regard). He relies on evidence that has been adduced by Mr Sharma in relation to what the position would be as a matter of Chinese law in relation to the incorporation of an arbitration agreement where there is no express reference to the actual charter party.

28 So far as Art. 10(2) is concerned, I was referred to **Dicey & Morris** at para.32.11(4) and 32.11(5), which provide as follows:

> "A similar approach has been adopted by the regulation in Art. 10(2) which is reproduced in clause 2, that provides that a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law which would govern the contract or term of the regulation. According to the Giuliano Legarda report the equivalent provision in the Rome Convention (which is Art. 8(2)) was intended to provide a special rule relating only to the existence and not to the validity of consent. It was specifically adopted in order to deal with the problem of the implications of silence by one party as to the formation of the contract; but the word "conduct" is to be taken to cover both action and inaction by the party (who may be the offeror or offeree) in question and does not

> relate solely to silence. The words "if it appears in the circumstances" mean that the court must have regard to all the circumstances of the case not solely to those in which the party claiming that he has not consented to the contract has acted, and particular consideration should be given to the practices followed by the parties inter se as well as their previous business relationships. The effect of clause (2) is that a party will not be bound if he shows that under the law of the country of his habitual residence he did not consent; it does not allow him to set out the laws of his habitual residence to establish that there was a contract which, according to the putative governing law, does not exist. In *Egon Oldendorff v Libera Corp* [1995 2 LR 64] one of the questions was what law should apply to determine whether a contract has been concluded between a German company and a Japanese company and, if so, whether a London Arbitration agreement was incorporated in the contract. It was held that English law should apply to these questions; it would be wrong for Japanese law to determine the effect of the Japanese company's conduct. Japanese law would only be relevant if the London Arbitration clause were ignored. To ignore the arbitration clause would be contrary to ordinary commercial expectations."

29 I draw the following points from that passage from **Dicey & Morris** and the associated case referred to. Firstly, Art. 10(2) is a material identical provision to Art. 8(2) in the Rome Convention, and **Dicey** tells us that via the Giuliano Legarda report one is dealing with the problem and the potential unfairness of silence, acceptance by silence by one party to the contract. Although it is not limited to that, that type of scenario is a long way from the present situation.

30 Secondly, that consideration must be given to the practices of the parties, and that practice in this context is the usual practice of international trade and the carriage of goods by sea. As a matter of practical reality it is very common for cargo receivers to become bill of lading holders without being aware of or seeing the terms of any charterparty in the bills, and without being, I should add (from my own experience), very curious about what those terms are. The reason for that is clear and well understood, which is, of course, that the contract of carriage will come into existence at the time of issue of the bill of lading signed by the ship owner and issued to the shipper. In relation to the provisions of COGSA, the receiver only comes into the picture at a later stage and is presented with whatever those terms of that contract of carriage are. It is very well established in English law what practical considerations arise in relation to contracts of carriage under bills of lading.

31 Thirdly, I also draw attention to the *Egon Oldendorff v Libera Corporation* case, and from that *Dicey* draws the proposition, with which I agree, that where there is a London Arbitration Clause English law should apply to the question of whether that clause is incorporated or not as a matter of law rather than the law of the party's domicile, because to ignore the arbitration clause would be contrary to the ordinary commercial expectations of the parties *a fortiori* where there is an English law clause as well.

32 This area is not, in fact, without prior authority. Indeed, there is a helpful decision of Andrew Baker J on this point in the case of *Seniority Shipping Corporation S.A. v City Seed Crushing Industries Ltd* (*the "Joker")* [2019] EWHC 341 Com. That was another case of an anti-suit injunction being sought where there was a head time charterparty, and in that case a sub-voyage charter-party and an anti-suit injunction was before the learned judge in circumstances where Bangladeshi proceedings had been issued, and in circumstances where

an anti-suit was brought by the claimant to restrain the pursuance of those proceedings in the context of a contract of carriage governed by English law and with an arbitration agreement.

33 The Defendant did not appear and was not represented on that hearing. It is perhaps for that reason that the learned judge considered the issues arising with very considerable care and at some considerable length. Realistically, Mr Happ**é** recognises, without formerly conceding the point, that the sentiments expressed by Andrew Baker J, with which I agree, are very much against his proposition and reliance on Art. 10(2).

34 As is apparent from paragraph 7 of that judgment, the arbitration clause in the voyage charter in question, clause 6, entitled "Law and Arbitration Clause" was as follows:

> "(a) This contract is governed by and construed in accordance with English law."

The Bills of Lading, as in the present case, were in the Congen 1994 form, which is designed, as it states on its face, to be used with charter parties, and provides, on its face "Freight payable as per CHARTER-PARTY dated" the date, in that case, being left blank ("…as often occurs, especially when as here the bill is "FREIGHT PREPAID" (as the learned judge noted at [11] of his judgment)).

35 It also provided, as in the present case:

> ""FOR CONDITIONS OF CARRIAGE SEE OVERLEAF", and by Condition of Carriage (1) on the reverse provides that: "*All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated*"."

36 In that case, as in the present case, the first issue is:

> "Before the English court, applying English conflict of laws rules, the question is whether the Bills of Lading incorporate the express choice of English law from the voyage charter is governed by English law by virtue of Art. 10(1) of the Rome I Regulation (EC) No. 593/2008), subject to Art. 10(2). If that choice of English law is incorporated, so that Bills of Lading are by express choice governed by English law, then so too under English conflict of laws rules the question whether the voyage charter arbitration clause is incorporated is governed by English law, by virtue of the 'putative proper law' rule of the common law (for which, see *Dicey, Morris & Collins, "The Conflict of Laws"*, 15th Ed., paras.32-110 to 32-112), since Rome I does not apply to arbitration agreements" as recounted by Andrew Baker J at [12] in that case.

As he stated:

> "If in each case the question is governed by English law, then straightforwardly: i) the choice of English law as governing law is indeed incorporated into the Bills of Lading by the Congenbill 1994 Condition (1); and ii) likewise (in that case) the voyage charter arbitration clause is indeed incorporated into the Bills of Lading by that Condition."

37 After setting out Art. 10(2) of Rome I at [13], at [16]-[20] Andrew Baker J stated as follows:

> "16. As regards Art. 10(2) of Rome I, in my judgment it is eminently reasonable and in accordance with the ordinary expectations of international trade to judge the effectiveness of the incorporation into the Bills of Lading of the choice of governing law specified by the voyage charter by reference to the law so specified. That, I emphasise, is not because the law so specified is English law – the same conclusion would *prima facie* be justified whatever system of law had been chosen for the voyage charter and therefore, by the use of the Congenbill 1994 form, putatively chosen for the Bills of Lading.
>
> 17. Whilst I cannot set out full particulars because the defendant has not participated or provided evidence, this case appears to be a classic example of the harmonious pattern of individual, bilateral contracts by which international trade in goods to be carried by sea is so habitually conducted. The defendant, as a buyer who wished to leave to its seller responsibility for arranging carriage, had full freedom of contract to specify the form and terms by and upon which it entitled and required the seller to cause it to become privy to a contract with the claimant as carrier. The Bills of Lading which were in a very well-known, widely used form, commonly accepted for trade worldwide, may be taken to have conformed to the defendant's contractual requirements (or, if not, to have been the subject of a free choice by the defendant to accept them nonetheless). If the defendant wished not to be obliged to arbitrate in a neutral, international forum (in the event, London), or wished to be so obliged only if the arbitration clause in question was set out expressly in any bills of lading rather than being incorporated by reference, then it was free to choose only to contract on that basis, for example by purchasing on f.o.b. terms and concluding the carriage contract itself, or by purchasing on c.&f. terms (or similar) but insisting on sale contract provisions as to the carriage contract to be tendered that fitted that requirement (*cf* UCP 600 Art. 20(v)/(vi) and *Benjamin's Sale of Goods*, 10th Ed., at para.19-041). Of course, the defendant might or might not have the bargaining power so to insist in the market in which it operates, but that does not detract from the proposition that choosing to contract without so insisting will have been a free choice.
>
> 18. The approach I have articulated above is, in my view, right in principle. It also accords with the approach taken by Mance J (as he was then) in *Egon Oldendorff v Libera Corporation* [1995] 2 Lloyd's Rep 64, at 70 rhc to 71 lhc. That was not a final decision, since the Art. 10(2) issue was raised (under Art. 8(2) of the Rome Convention, as it was then) not at trial but on a challenge to jurisdiction under RSC Order 12 rule 8 (CPR Part 11, as it would be now). When the question of governing law later came to trial, as a preliminary issue before Clarke J (as he was then), the Art. 8(2) point was not pursued after all (see *Egon Oldendorff v Libera Corporation* [1996] 1 Lloyd's Rep 380).

19. This is not the occasion to consider at length, or more generally, the possible problem of a 'conflict of conflicts', as discussed by *Raphael, "The Anti-Suit) Injunction"*, 2nd Ed., at para.8.31 ff, and in that author's Art. at [2016] LMCLQ 256, "*Do as you would be done by? System-transcendent justification and anti-suit injunctions*". But it will be appreciated that I do not agree with the comment in the book at para.8.40 that there is a "*little meaningful sense in which the holder [of a bill of landing] has 'freely chosen' to agree to be bound by the exclusive forum clause [incorporated into it from a charterparty by reference]*". The holder's freedom of choice, at all events in a typical international trade transaction such as the present, exists and is exercised when he concludes the trade contract pursuant to which he will be entitled to become and in due course becomes the holder, or when he chooses to take up the documents and become the holder although (if this be the case) he contracted not to accept bills that incorporated charterparty terms by reference.

20. For the reasons given above, I conclude that the Defendant was indeed bound to refer to arbitration in London any claim against the claimant in respect of the seawater damage to the cargo carried under the Bills of Lading. It is plain on the evidence in this case that the defendant had no need to commence suit in Bangladesh or arrest the *Joker* in order to obtain reasonable security for its possible claim. The threat of such action would have resulted, I am clear, in the same, proper and reasonable, offer of security in fact made in response to the Cargo Claim, namely the provision of a P&I Club letter of undertaking from the Standard Club that would respond to a London Arbitration Award of up to US$4.84 million, inclusive of interest and costs. The defendant commenced and has pursued the Cargo Claim, to the extent it has to date, only because it refuses to honour its contractual obligation to arbitrate and (at least initially) it sought fancifully to suggest that it might have a claim for a total loss of the entire cargo, even though only cargo in hold no.4 suffered damage, and sought to use the Cargo Claim oppressively to extract security for a sum equivalent to c.US$15.4 million. The Cargo Claim was brought in breach of the contract and, unless the claimant has somehow lost the right to have claims arising out of the Bills of Lading referred to arbitration, any further pursuit of the Cargo Claim by the defendant would be in continuing and further breach of contract."

38 I gratefully adopt, and can do no better, than the sentiments expressed by Baker J at [16] to [20] of the judgment in the *Joker*. I consider his insightful analysis is correct and accurately reflects the position in relation to the application of Art. 10(2).

39 In such circumstances, I am satisfied that the Defendant has not discharged the burden that is upon him of establishing that it would be unreasonable to apply the putative applicable law to the issue of the contract formation, and has not demonstrated that the Defendant has not consented to be bound by the contract, here the agreement to arbitrate. Provisions in the Congen bill such as the present are the very life blood of international trade, and the approach to incorporation that has been identified is the approach which is regularly applied. It would be, I am satisfied, wrong in principle to ignore English law and the very arbitration

provision which is there set out, for the reasons identified by Andrew Baker J, which have equal application to the present case. I am satisfied, therefore, that English law is the law which governs the question of incorporation, there being no scope for the application to the exception in Art. 10(2) on the facts and circumstances of the present case.

THE APPLICABLE CHARTER-PARTY

40 The front of all five Bills of Lading provide, as I have already noted: "FREIGHT PAYABLE AS PER GOVERNING CHARTER-PARTY" and "FOR CONDITIONS OF CARRIAGE SEE OVERLEAF". As I have already also noted, on the reverse side, Clause 1 of the Bills of Lading provides as follows:

> "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated".

41 It is well-established that where the words of incorporation in a bill of lading include a clear reference to the Law and Arbitration Clause of a charterparty, that clause will be incorporated into the contract contained in and evidenced by the bill (see *The Rena K* [1978] 1LR 545 at p.551 per Brandon LJ). I am satisfied that Clause 1 of the Bills of Lading satisfies the requirements of clear wording and is accordingly effective to incorporate a charterparty Law and Arbitration Clause.

42 As I have already noted, there are two candidates for "the Charter-Party" referred to in Clause 1 of the Bills of Lading, the Head-Charter and the Sub-Charter. The debate is moot and academic in the present case, given that I am satisfied, for the reasons that I have given, that both charters contain an identical English law, an LMAA Arbitration Clause (collectively the "Law and Arbitration Clause").

43 For his part, Mr Happé, on behalf of the Defendant, and in an attempt to submit that the terms of the Sub-Charter were incorporated but that those terms were uncertain and so there was no binding arbitration clause (a submission which if ever tenable was only tenable before the evidence of Mr Winter and is now wholly untenable in the light of the unredacted Sub-Charter that is before me) submitted that it was the terms of the Sub-Charter that were incorporated.

44 He submitted that there is "no rule" that the head-charter is incorporated by reference to *The San Nicholas* [1976] 1Lloyd's LR 8. The main issue was whether a charter has been incorporated at all. The question as to which charter had been incorporated was decided only as a preliminary issue to serve a claim form out of the jurisdiction on the defendant. It was answered by the court simply referring to *Scrutton* without any detailed reasoning .

45 In *The Heidberg* [1994] 2 LR 287 HHJ Diamond QC (*obiter*) held that the bill of lading incorporated the terms of the contract of affreightment, not the head charter party. The reasons he gave were that:

(i) "The normal rule" that the head charter party is incorporated applies only if it appears that the words of incorporation were designed to give the owners a lien on the cargo for freight or demurrage.

(ii) A bill of lading, however, is a bilateral contract and while weight should be given to the presumed intention of the master who signed and issued the bill, equal weight must be given to the intention of the shipper.

46 In *The Nai Matteini* [1988] 1 Lloyd's LR 452 and *The Sevonia Team* [1983] 2 Lloyd's LR 640, the head charterparty was incorporated. In *The Heidberg* and *Lignell v Samuelson* [1921] 9 Lloyd's LR 361, the charter party to which the shipper was party was preferred. Mr Happé points out that in all those cases, apart from *Lignell v Samuelson* and *The Sevonia Team*, the finding was obiter, and in *The Sevonia Team* the sub-agreement (the "transportation agreement") was wholly inapposite and the court applied the head charter party. The shippers were not, in terms, a party to either charter. The exact relationship between the shippers and the sub-charterer, COFCO International Freight SA, is not known, but the Defendant hypothesises that it may be that the Sub-Charterers and two of the shippers, COFCO International Brazil and COFCO International Grains LTDA, have a connection, and he submits that this would militate in favour of identifying the Sub-Charter as the charter incorporated.

47 It is also pointed out that the Claimant's own solicitors in a letter to the Defendant dated 9 July considered that the terms of the sub-charter, as a time charter trip, were incorporated. I have also been referred to the terms of appointment of Mr Gaunt as the Owners' arbitrator, in which he is clearly appointed in respect of disputes arising under the contract of carriage. But in the context of incorporation, there is a reference to the Sub-Charter. Ultimately, however, what the Claimant's solicitors may or may not have thought is the appropriate charterparty is beside the point. It is a matter for determination by this Court, if it mattered. However, it is common ground that it does not matter. In circumstances where the point is academic, and does not impact upon, the outcome of the present application, it would unduly lengthen this judgment to examine the case law in great detail.

48 However, I consider that whilst there is no "rule" to such effect, the general presumption, in terms of incorporation of charterparties into bills of lading, is that it is indeed the head-charter which will normally be incorporated into the bill of lading, because it is the head charter to which the ship owner was party, and therefore as carrier the terms of which he will be aware and consented to contract (see *The San Nicholas* [1976] 1 Lloyd's LR 8 at p.11 (lhc), para.7.11(3) of **Bills of Lading** (2nd Edition 2015), and **Scrutton on Charter Parties** 24th Edition 2020 para.6020. However, as the editors of **Scrutton** note, this will not invariably be so, and the court may conclude on examining the facts that the intention was to incorporate the sub-charter. The example they give is where the charterer issues the bill of lading, which is of course not the present case.

49 This approach has its critics, and the associated reasoning may be open to question if one looks, in the conventional manner, at the presumed intentions of both parties as objectively to be ascertained; as the shipper drawing up and presenting the bill may, by parity of reasoning, be unlikely to contemplate a head-charter to which he is not a party (see **Bills of Lading** at para.7.11(3)). The general presumption may be displaced where the head-charter is a time charter and the sub-charter is a voyage charter where the parties are presumed to wish to incorporate the more apposite terms of a voyage rather than a time charter into their contract of carriage, particularly where the words of incorporation in the bill are "Freight Payable as per Governing Charterparty" (see *The Kolan No. 2* [2009] 1 Lloyd's LR 1124 per Jonathan Hirst QC sitting as a Deputy Judge of the High Court at [64]).

50 However, the sub-charter in this case is, as is now known, a trip time charter not a voyage charter, and I do not consider that its terms would be any more apposite to be incorporated into a bill of lading contract than the Head-Charter. If it had mattered, which it does not on the facts, I consider that it was the Head Charter which was incorporated as the charter to which the carriers were the party. In the above circumstances, I am satisfied, and find, that

there is a London Arbitration Clause in the contract of carriage contained in and evidenced by the Bills of Lading, whichever charterparty is incorporated by reference.

51 The commencement of substantive Chinese proceedings (as opposed to arrest proceedings solely designed to obtain security) will be a breach of a contractual agreement to arbitrate in London unless there has been a variation of the contact of carriage. It is clear from the Statement of Claim in the Chinese proceedings that the Defendant's claim against the Claimant is in respect of damage suffered by the cargo during the course of the carriage under the Bills of Lading, and as such, absent a variation of the contract of carriage, and the associated agreement to arbitrate, the commencement of the Chinese proceedings will be a breach of the contractual agreement to arbitrate in London.

DEFENDANT BOUND BY THE ARBITRATION CLAUSE

52 It is not suggested that the Defendant is anyone other than the lawful holder of the Bills of Lading having relied upon its rights as lawful holder to take delivery of the cargo and to claim losses in respect of the alleged damage thereto against the Claimant under the Bills. Accordingly, rights of suit vested in the Defendant pursuant to s.2(1) of the 1992 Act, and by s.3(1) of the same, the Defendant became bound by the original contracting party's liability under the contracts of carriage contained in and evidenced by the Bills of Lading.

53 It is well-established and trite law that one such liability binding upon the lawful holder of a bill is the obligation to resolve any claim under the bill in accordance with its terms, including the agreement to resolve disputes in a particular forum- see (*The Kishore* [2016] 1 Lloyd's LR 427 at para.31 (where the proposition was common ground)).

WAS THE ARBITRATION AGREEMENT VARIED OF SUPERSEDED BY THE CHINA RE LOU OR IS THE CLAIMANT ESTOPPED FROM RELYING ON THE SAME?

54 The relevant law for determination of this question is English law, being the governing law of the Law and Arbitration Clause, (and of the contract for carriage contained in and evidenced by the Bills of Lading) as I have found. The Defendant's reliance in Mr Sharma's first witness statement on the manner in which the Chinese court would allegedly treat the agreement to arbitrate is, in this context, accordingly misplaced. If, however, it had been relevant, which it is not, in fact the evidence in Mr Green's second statement identifies that the Chinese court would not consider the LOU to supersede or vary the agreement to arbitrate contained in the Bills of Lading.

55 The Defendant raises three arguments to the effect that the LOU has somehow varied or superseded the Bills of Lading and the parties' agreement to arbitrate disputes arising thereunder:
(i) that the wording of the LOU varied the agreement to arbitrate between the Claimant and the Defendant;
(ii) that there has been a submission to the Chinese Courts by the Claimant by reason of the LOU; and
(iii) that the Claimant is estopped in this application from asserting an agreement to arbitrate.
At times the points being relied upon merged into different aspects of those three points. I am satisfied that none of these arguments bear examination, that each is without substance, and that none of them have been proved by the Defendant (the burden of proof being upon the Defendant in each case).

VARIATION BY THE WORDING OF THE LOU

56 I am satisfied there are a number of reasons why the LOU does not give rise to a variation of the agreement to arbitrate contained in the Bills of Lading. First, there is nothing in the plain wording of the LOU which supports any agreement or intention to abandon the Claimant and the Defendant's agreement to arbitrate disputes arising under the bill of lading. On the contrary, the LOU is expressly stated to be given "without prejudice to any rights or defences available to the owners". I am quite satisfied that such rights include the rights to have disputes determined in London Arbitration. It is quite clear from this express provision of the LOU that the LOU is not intended to affect the rights available to Owners, including the right of Owners to arbitrate in respect of the underlying dispute.

57 In this regard, I disagree with the submission of Mr Happé, in which he suggested that the words "any rights available to the owners" are cut down by the words that follow, including the right to limit liability in accordance with applicable laws. The very words "without prejudice to any rights or defences available to the Owners of the MV Ulusoy, including the right to limit liability in accordance with applicable laws" shows that those rights are not limited to the right to limit, or anything analogous to the right to limit, but are the widest possible general words as emphasised by the words "without prejudice" and the word "any" which is as wide as it is possible to be. It is quite clear that the objective intention of the parties to that letter of understanding was that all rights of the Owners, which I am satisfied must extend to the right to arbitrate (and the corollary obligation to respond and to arbitrate as well on the part of the Defendant), applies.

58 Secondly, the final paragraph of the LOU specifically provides that it is the LOU that is subject to Chinese law and jurisdiction. There is no basis upon which the words "this letter of undertaking" in that final paragraph could be read as referring to "all disputes arising under the bills of lading", which would be necessary on the Defendant's case.

59 Thirdly, and fundamentally, the LOU is a distinct agreement between a third party, China Re, and the Defendant. It is not, and does not purport to be, an agreement between the Claimant and the Defendant. As a matter of privity therefore it cannot vary any existing agreement between the Claimant and the Defendant without a corresponding agreement between those two parties. There is no such agreement.

60 Fourthly, it cannot possibly be said that in providing the LOU China Re was in some way binding the Claimant to any alleged agreement to vary the agreement to arbitrate, for a number of reasons:

(i) China Re was not acting, was not purporting to act, on the Claimant's behalf in providing the LOU;

(ii) the LOU does not contain, or purport to contain, any words that could possibly be construed as an agreement to vary the agreement to arbitrate by or on behalf of the Claimant;

(iii) nor could it be suggested that the LOU was given in consideration of the Claimant and the Defendant agreeing to vary its agreement to arbitrate. On the contrary, China Re provided the LOU in return from the Club security and a one per cent commission fee of $50,000 provided by the Standard Club, the Claimant's P&I Club;

(iv) the Defendant knew that a P&I Club was behind the provision of security because the Standard Club had offered security but the Defendant had refused it, preferring to have security from a Chinese domiciled entity. It therefore chose to enter into a separate contractual agreement with China Re and not the Claimant's P&I Club, still less the Claimant itself;

(v) even if the Owner's P&I Club had been party to the LOU, such security for the release of the Vessel would have been provided by the Owner's P&I Club in discharge of its obligation to its member owner, and

(vi) in the present case the LOU was not provided by China Re "on behalf of" or "as agent for" the Claimant, and it was done in the way it was done at the express insistence of the Defendant itself.

61 Yet further, and whilst one party's subjective understanding is irrelevant, there is, I am satisfied, no credible basis for the alleged understanding by the Defendant that the effect of the LOU was that the parties had agreed to vary the agreement to arbitrate. Not only does the LOU not so provide, and it was given by China Re and not the Claimant, the evidence is also that there was no discussion to that effect between Wan Jing and Lu Lan on behalf of the Claimant and the Defendant respectively.

62 The Defendant's submissions ultimately simply ignore the fact that the LOU is a separate contract, that this was a separate contract between China Re and the Defendant, that it had a separate subject matter, and that it is concerned and concerned only with the undertaking of China Re and does not vary the agreement to arbitrate.

63 What it represents, and what it responds to, is to be determined by its proper construction, and whether the Defendant made a good, bad, indifferent or ambiguous bargain with China Re in that regard does not, and cannot, impact upon the contractual agreement to arbitrate, although in fact, as appears below, it would respond to an arbitration award, as has been confirmed by the Claimant's Chinese lawyers acting on behalf of China Re.

64 An additional point that was raised by Mr Happé in his oral submissions, but not, I note, in the evidence of Mr Sharma, nor indeed in Mr Happé's detailed skeleton argument, is to rely upon another provision of the letter of undertaking, which is the following paragraph:

> "We confirm we have been advised by the owners of MV Ulusoy 11 that they agree to a appoint Wang Jing & Co., Qingdao Branch, address Room 1501, Block B, China Resources Building, 6 Shangdon Road, District, Qingdao 266071, PR China, Telephone 053266951102, to accept service of all legal proceedings on their behalf arising out of the claim in relation to the above matter".

Mr Happé, for the first time, in his oral submissions suggested that this amounted to a variation of the agreement to arbitrate, or, alternatively, as a submission to the jurisdiction of the Chinese Court, such that the agreement to arbitrate was superseded.

65 I am satisfied that this is a bad point. Wording such as that, in my experience, is typical of wording in LOUs, whereby such LOUs will contain a provision in relation to service upon a lawyer. That is a standard provision which does not result in any variation of the underlying contract of carriage or a submission to the particular court. It is merely a provision which is put in place so that there is a lawyer who accepts service. That is the standard wording, which does not affect the overall position, in particular when it is read together with the

other provisions of the letter of undertaking, and in particular the paragraph in which it is made expressly clear that the letter of undertaking is without prejudice to any rights or defences available to the owners of the vessel.

66 In that regard, the fact that it so happens that the lawyer concerned, Wang Jing, is a Chinese lawyer, does not make any distinction from that standard and very common provision. Accordingly, that additional argument, the worth of which is perhaps reflected in the fact that it was not even raised until during the course of oral submissions, does not take matters any further, and does not provide a sound basis either for a variation to the agreement to arbitrate, or indeed a submission to the Chinese Court, to which I will now turn.

SUBMISSION TO THE CHINESE COURT

67 It is alleged by Mr Sharma at paragraph 12 of his statement that the wording of the LOU itself amounts to a submission by the Claimant to the Chinese court that would, as a matter of Chinese law, supersede any arbitration agreement. However, it is a question of English law as to whether there has been any variation of the agreement to arbitrate, or whether any act taken by the Claimant amounts to a submission to the jurisdiction of the Chinese Court such as to waive its rights to have disputes under the Bill of Lading determined by arbitration in London.

68 As to the former, i.e. any variation of the agreement to arbitrate, there is nothing in relation to the LOU, and there is nothing in the Claimant's reaction to the Chinese proceedings, that could amount to a variation of the agreement to arbitrate. For there to be a contractual variation the requirements for a contract would have to be met, and one would expect any such contractual agreement, or variation, to be made expressly in writing, or evidenced in writing, given the importance of the subject matter (a contractual agreement to arbitrate). The Defendant's attempts to construct such a contract are, with the greatest respect to Mr Happé, wholly without merit. It is suggested that the offer is the proposed LOU, which was accepted by the Defendant, and the consideration is the Defendant's agreement to and cooperation in the release of the Vessel.

69 Quite apart from ignoring the fourth requirement for a contract, including a contract variation, namely, an intention to enter into legal relations, of which there is no evidence whatsoever of any such intention on the part of the Claimant (or for that matter the Defendant) this analysis is simply contrived. The Claimant had not made any offer. It is China Re that offers to enter into contractual relations with the Defendant on particular terms. The Defendant can take or leave those terms, although ironically, as I understand it, it is the Defendant that proposed those terms. In any event, whether that is the case or not, it is those terms, good, bad or indifferent for the Defendant, to which the Defendant agrees, and the Defendant's agreement to release the Vessel is in consideration for the LOU, nothing more, nothing less, a contract separate from and distinct from the agreement to arbitrate and between different parties.

70 The suggestion of some form of waiver does not bear examination either. There is nothing in the LOU that purports to be an agreement on the Claimant's part to litigate in China or waive its right to arbitrate disputes under the contract of carriage. Equally, the Claimant has only just (on 25 August 2020) been served with the Chinese proceedings. It has until 24 September 2020 to submit its challenge to jurisdiction to the Chinese court, and the evidence is that it intends to do so on the basis of the Law and Arbitration Clause. Far clearer wording in a letter of undertaking, or in conduct subsequently, would be needed to begin to give rise even to an arguable case of waiver, and the Defendant would face the same insurmountable difficulties as in relation to an alleged variation of the agreement to arbitrate

(not least the different parties to the LOU and the fact that China Re are not acting on behalf of the Claimant).

71 I am satisfied, and find, that there has been no submission to the Chinese Court so as to have found an unequivocal act of waiver by the Claimant of its rights. I am also satisfied that the effect of the LOU as a matter of Chinese law is not relevant to the question of whether the Claimant agreed to waive its rights under the Bill of Lading. But, as is apparent from Mr Green's second witness statement, the evidence, which I accept, is that a Chinese Court would not consider the LOU to constitute a submission to the Chinese Courts of the disputes under the Bills of Lading on its wording had that, contrary to my views, been relevant.

TO WHAT DOES THE LOU RESPOND?

72 An issue to which both Mr Sharma and the Defendant's skeleton devotes a substantial amount of time is as to what the LOU responds to. I am satisfied that this is a red herring, that neither assists in relation to whether there remains a binding arbitration agreement, nor as to whether there are strong grounds not to grant an injunction if there was an agreement to arbitrate. The LOU provides, amongst other matters, as follows:

> "To COFCO Global Harvest … and/or specific insurance company as cargo insurer, guarantor China Re Insurance (Group) Corporation guaranteed, the owners of the MV Ulusoy 11. In consideration of your releasing and/or refraining from arresting or otherwise detaining MV Ulusoy 11 or any other vessel or property in the same or associated ownership, management, possession or control, in connection with your claim arising out of the above incident, we, China Re Insurance (Group) Corporation, for the owners of the MC Ulusoy, **hereby undertake to pay to you on demand such sum or sums as may be either agreed in writing between you and the owners of MV Ulusoy 11 or as may be adjudged or ruled without the right of appeal by a competent court to be due to you from the owners of the MV Ulusoy 11 in respect of the above claim** provided always that the total of our liability under this letter of undertaking shall not exceed the sum of US $5 million only inclusive of interest and costs. **This letter of undertaking shall not be construed as any admission of liability, amount, expense or any issues by the owners of MV Ulusoy 11, and is given without prejudice to any rights or defences available to the owners of the M V Ulusoy 11 including the right to limit in accordance with applicable laws** … We confirm we have been advised by the owners of MV Ulusoy 11 that they agree to appoint Wang Jing & Co. Qingdao Branch … to accept service of all legal proceedings on their behalf arising out of the claim in relation to the above matter … This letter of undertaking (including dispute resolution clauses) shall be governed by and construed in accordance with PRC law, and any dispute arising thereof shall be subject to the exclusive jurisdiction of the PRC court". (emphasis added)

73 First, and fundamentally, and as already noted, the LOU responds to what it states it responds to. It would not assist the Defendant if it responded only to a court judgment. That would simply be the bargain made between it and China Re.

74 The point would be no better if it was deployed at a later stage, i.e. as an alleged strong reason for not granting an anti-suit injunction.

75 However, I am satisfied that the LOU does respond to an arbitration award (and even if it only responded to a judgment, an award could be converted to a judgment). Indeed, the evidence that is before me, which I accept, is that it is the practice of the Chinese Courts to give effect to arbitration awards by entering a civil judgment, which on any view would lead to the LOU responding on the express words of the LOU.

76 The evidence from the Claimant's Chinese lawyers, Wang Jing, as set out in Mr Green's second witness statement, is that as a matter of Chinese law, Chinese law being the proper law of the contract, the LOU, for the purpose of any claim brought by the Defendant against China Re for payment under the LOU, is that the LOU does respond to an arbitration award from a competent tribunal and would not be read as being responsive only to a court judgment (see in particular Mr Green's second statement at para.16).

77 In addition, in that regard, Wang Jing, acting on behalf of China Re, on whose behalf they were authorised to act, on the evidence before me, including the evidence of Mr Green, gave a clear undertaking in writing by an e-mail on 30 July 2020. It was addressed from Wang Jing to the Lu Yan Law Firm, i.e. those lawyers in China acting on behalf of the Defendant, and it provided as follows:

> "Dear Ms Lu/ Ms, Your below e-mail is well received. We would like to reply as follows:
>
> (1) Upon becoming holder COFCO consented to the terms of the bills of lading. As holder of the bills of lading COFCO receives the goods subject to the terms of the bills of lading. The terms of the bills of lading incorporate the terms of the charter-party (either the head-charter or alternatively the sub-charter) and the charter-party provides for English law in London Arbitration. Accordingly, COFCO made a binding agreement to have disputes arising out of or in connection with the bills of lading determined in London Arbitration.
>
> (2) Accordingly, the Qingdao proceedings are in breach of that agreement.
>
> (3) A Chinese court would recognise that the China Re LOU wording covers and responds to an arbitration award issued by a competent tribunal, so COFCO as consignee is fully protected. For the sake of good order and for the avoidance of any argument we confirm that the security will respond to an arbitration award.
>
> (4) We therefore once again invite COFCO again to withdraw the Qingdao proceedings and agree to have disputes determined London Arbitration, failing which we will seek an anti-suit injunction from the English court and COFCO will be liable for the costs of those proceedings and any losses which our clients seek in having to defend the Qingdao proceedings."

78 The evidence of Mr Green in his second witness statement, at para.70, is that Wang Jing do indeed have authority to state that which is stated in that e-mail, including the passage that I have identified. I have no reason not to accept that evidence from a solicitor of the Senior Courts in relation to the authority position of Wang Jing, which is, of course, entirely

consistent with the fact that it was Wang Jing who negotiated the LOU on behalf of China Re itself. I refer to that undertaking that I have just emphasised as "the Wang Jing undertaking". Wang Jing have advised that as a matter of Chinese law should it come in the future to the Defendant calling on the LOU on the basis of an arbitration award before the Chinese court it is highly likely that the Wang Jing undertaking would itself be binding on China Re, such that China Re would not be able to deny the responsiveness of the LOU to an arbitration award, as set out in the passage of Mr Green's second statement that I have referred to.

79 On 26 August 2020, following receipt of Mr Sharma's first witness statement, the Standard Club, for Owners, wrote to Clyde & Co., for the Defendant, stating in terms: (i) the Claimant's position is that the LOU responds to a London Arbitration Award; (ii) it would reimburse China Re under the Club security in response to presentation of an award from a competent tribunal, and (iii) neither the Claimant nor the Club will take any point, including before a Chinese court, that the club's security or the LOU do not respond to an arbitration award. In this regard, the club security, which is before me, is also governed by Chinese law and jurisdiction in favour of arbitration in China. There would be no possible reason for China Re to deny it did not so respond given its counter security by the Club, a member of the international group of P&I Clubs

80 I am satisfied, on the evidence before me, that the LOU would respond to a London Arbitration Award. That is the end of any suggestion that a failure to respond would be a strong reason not to grant an injunction. However, the Defendant's point on the construction of the LOU does not assist it at the earlier stage when it suggests that any agreement to arbitrate had been superseded or varied, for the reasons I have already identified. The LOU is a separate contract between China Re and the Defendant and it was a matter for them to agree what it responded it. Had it only responded to a judgment, so be it, that is the bargain that was made between them. For there to be a variation to the agreement to arbitrate there would have needed to be an agreement between the Claimant and the Defendant in clear and unequivocal terms. No such agreement exists.

ESTOPPEL

81 Turning then to the allegation of an estoppel. No coherent case of estoppel is articulated in Mr Sharma's statement, and he does not even state what form of estoppel the Defendant seeks to rely upon, nor is the same articulated in the Defendant's skeleton argument. Whilst estoppel is identified as an issue therein, no coherent case of estoppel is referred to in the relevant part of the skeleton. The nearest that the Defendant gets to any such case is to submit that the Defendant agreed to release the Vessel from arrest in reliance on the provisions of the LOU and its promise ("for the Owners") to pay the sum adjudged or ruled without the right of appeal by a competent court. But there is no representation made by the Claimant in the LOU, still less a clear and unequivocal one that it will not rely upon its rights under the Law and Arbitration Clause to have a dispute arising under the Bills of Lading determined in London Arbitration. The allegation of estoppel is, I am satisfied, demurrable.

82 In the above circumstances, and for the above reasons, I am satisfied and find that the Defendant was and remains bound by the agreement to arbitrate in London, that there has been no variation of that agreement, or waiver of the Claimant's right to arbitrate the cargo claim, and that the Claimant is not estopped from relying on the agreement to arbitrate.

APPLICABLE PRINCIPLES IN RELATION TO ANTI-SUIT INJUNCTIONS

83 The applicable principles in relation to the granting of anti-suit injunctions are well established and common ground. No issue is taken by Ms Morgan for the Claimant with Mr Happé's summary thereof. In this regard:

(1) The Court has the power to grant interim injunctions pursuant to s.37 of the Senior Courts Act 1981 in all cases where it appears to be just and convenient to do so, whether unconditionally or on such terms and conditions as the Court thinks fit.

(2) As an equitable remedy involving the exercise of discretion by the Court, the test is what the ends of justice require: *Emmott v Michael Wilson & Partners Limited* [2018] 1 LR 299 at para.36 per Sir Terence Etherton, MR.

(3) This power extends to restraining foreign proceedings when brought, or threatened to be brought, in breach of a binding arbitration agreement: *Ust-Kamenogorsk Hydropower Plant JCS v AES Kamenogorsk Hydropower Plant LLP* [2013] 1 WLR 1889 (SC).

(4) Since it indirectly affects a foreign court the jurisdiction must be exercised with caution: *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] UKPC 12, [1987] AC 871 at p. 893E per Lord Goff.

(5) The requirement for caution in this context does not mean that the Court should refrain from granting the injunction but rather that it should not do so except with circumspection: *The Angelic Grace* [1995] 1 LR 87 at p.92 per Leggatt LJ.

(6) The Claimant must demonstrate a negative right not to be sued. On an interim injunction the standard of proof has been stated as "a high degree of probability that there is an arbitration agreement which governs the dispute in question": *Emmott* at para.39, *Ecobank v Tanoh* [2016] 1 WLR 2231 at para.74 to 77 per Christopher Clarke LJ. However, as what is sought in the present case is a final injunction rather than an interim injunction it is common ground that the standard is a higher one, namely, the Claimant must prove that there is an agreement to arbitrate to the civil standard, i.e. on balance of probability, as I am satisfied the Claimant has done for the reasons that I have given.

(7) If the Claimant meets that standard the Court will ordinarily exercise its discretion to grant an injunction unless the Defendant can show strong reasons to refuse the relief: In *The Angelic Grace* [1995] 1 LR 87 the Court of Appeal held that the Court should feel no diffidence in granting anti-suit relief so long as it is sought promptly and before the foreign proceedings are too far advanced (see also *The Jay Bola* [1997] 2 Lloyd's LR 279 (Court of Appeal) at p.286 per Hobhouse LJ (as he then was).

(8) In that regard, it is the Defendant that bears the burden of proving that there are strong reasons to refuse the relief: *Donohue v Armco* [2002] 1 AER 749 at [24]-[25] per Lord Bingham.

84 In the present case, and for the reasons I have given, the Claimant has proved to the requisite standard that there is an agreement to arbitrate in London and on *Angelic Grace* principles I consider that it is appropriate to grant the relief sought to prevent the continuing breach of the agreement to arbitrate in the form of the wrongdoing of the Defendant in commencing

and continuing the Chinese proceedings, subject only to a consideration of whether the Defendant has proved that there are strong reasons to refuse relief.

85 The Defendant submits that there are two strong reasons why I should refuse relief. The first of these has already been addressed, at least in part, above. It is said that the Claimant obtained the release of the vessel against security, which will not answer to an arbitration award but that it will answer to a judgment or mediation of the Qingdao Court. It is said that if the relief is granted the Defendant will be left without security. I am satisfied, for the reasons I have already given, that this is wrong and the LOU will respond to a London Arbitration Award, and the Defendant released the Vessel against valuable security that will indeed respond to such an award.

86 The Defendant notes that the Claimant's case is that: (i) the China Re LOU as matter of PRC law would answer to an Arbitration Award; (ii) the Club's own LOU to China Re would so answer, and (iii) that neither the Claimant nor the Club "will take any point that the Club LOU does not respond to a London Arbitration Award as presented by China Re under the terms of the Club LOU, both generally and specifically, in any proceedings brought in the PRC under either the China Re LOU or the Club LOU."

87 The Defendant having noted that makes the following attempted riposte. It says that the first of these points is contested by the Defendant as a matter of PRC law, but this ignores the fact that this issue will simply not arise as the Defendant will not take the point itself, and indeed no doubt will be submitting to the contrary, and the Claimant is not submitting, and will not be submitting, that the LOU does not respond. So, its Club, that is the Standard Club, will not be stating otherwise to China Re under the back-to-back LOU, also governed by Chinese law, and accordingly China Re will be acting in accordance with the Standard Club's instructions. It is said that the second and third points do not affect the position of China Re, which is liable under the LOU. It is said that what is notably missing is any commitment from China Re itself.

88 I am satisfied that this submission is fundamentally flawed, and foremost it ignores the Wang Jing undertaking, the evidence being that Wang Jing have authority to act for China Re (see again Mr Green's statement at para.17). China Re are accordingly bound by that undertaking. Secondly, it ignores the back-to-back position with Standard and that China Re is secured by that back-to-back letter of undertaking in that regard. I am satisfied, in the above circumstances, that the wording of the LOU, and the consequences of the wording of the LOU, do not amount to a reason, still less a strong reason, not to grant the injunction sought.

89 However, even if, contrary to my findings, the LOU would not respond to a London Arbitration (or a judgment therefore, including a civil ruling of the Chinese courts (which seems unlikely) there is a further and fundamental flaw in the Defendant's argument in relation to strong reason. It ignores the fact that it was the Defendant who requested the LOU in the terms they did, and the Claimant agreed to the terms proposed. Once again, whether it made a good, bad or indifferent bargain was wholly down to the Defendant. If the terms of the LOU did not provide security that responds to a London Arbitration Award then the Defendant was responsible for the same. Any such failure to respond would not be a strong reason not to grant injunctive relief, and the Defendant has not, in all the circumstances, discharged the burden of proof that is upon it in that regard.

90 The second strong reason is itself, I am satisfied, without merit. It is said that:

> "As far as the Defendant understands there is no dispute that under PRC law the Qingdao court is properly seized of the dispute. Qingdao is the proper local court and the Defendant is not considered to have consented to arbitration for reasons of PRC public policy. As advised, these are set out at paras.27 to 28 of Mr Sharma's statement. They are coherent, and notably the position might well be different if the charter had been identified. The claimant cannot complain if on delivery of a cargo to PRC they are subject to PRC jurisdiction in circumstances where they (or their agent) failed to complete the bill with the identification of the charter."

91 This second reason ignores a number of matters. The first is that there has been no submission to the jurisdiction of the Qingdao court by the Claimant. The Claimant has only just been served and the Claimant is challenging jurisdiction. Secondly, I found that there is an agreement to arbitrate, and that it is determined on the basis of the putative proper law of the contract of carriage and agreement to arbitrate, which is English law. Under English law, and as I have found, there is an agreement to arbitrate. Thirdly, it ignores the wording of the LOU itself, which is expressly governed by PRC law and which expressly provides:

> "This letter of undertaking shall not be construed as any admission of liability, amount, expenses, or any issues by the owners … and is expressly given without prejudice to any rights or defences available to the Owners."

92 Fourthly, the provision of the civil procedural law of the PRC that is relied upon by the Defendant as the basis on which it is said that the Chinese Court have jurisdiction relation to the cargo claim, is subject to Art. 27 of same law, which provides:

> "Any dispute arising from foreign related economic trade, transportation and maritime issues under which the relevant parties have included arbitration clauses in the contract, or a written arbitration agreement agreeing with the case being submitted to the foreign related arbitration institute or other arbitral institute, shall not be brought to the people's court."

93 It is clear, therefore, that under PRC law, where there is an arbitration clause in the contract between the parties, the claim must be brought in arbitration. That principle is therefore recognised under PRC law and by the Chinese Courts. I have found that under the putative applicable law, which is English law, there is indeed an agreement to arbitrate in London. On the basis of Art. 27 of the Civil Procedural Law of the PRC such agreement would, on its face, be respected.

94 The Defendant also fails to have regard to Art. 95 of the Maritime Code of the PRC, which expressly provides that the rights and obligations of the carrier and the holder of the Bill of Lading shall be governed by the clauses of the Bill of Lading, with the result that the Defendant as holder of the Bills of Lading is bound by the terms of the Bills of Lading, including the clauses incorporated therein. Yet further, the putative proper law and the contract of carriage and the agreement to arbitrate are English law, and under English law, as I have identified, there is an agreement to arbitrate, which I am satisfied would be recognised in these Courts.

95 In the above circumstances, the Claimant is not subject to PRC jurisdiction. But even if that were to be the conclusion of a PRC court that would not amount to a strong reason not to grant the injunction in circumstances where the Defendant had agreed to arbitrate in London and was in breach, and continuing breach, of the arbitration agreement in commencing and continuing the above Chinese proceedings whether or not the Chinese Courts had jurisdiction. That, after all, is one of the very purposes of an arbitration agreement and the purpose of the anti-suit regime, which is to restrain a party proceeding in a foreign court. Whether or not that foreign court is of the view that a foreign court could in the normal course have jurisdiction, the parties are expected to comply with their contractual obligations and not breach their obligations by commencing proceedings in a foreign jurisdiction.

96 Accordingly, I am satisfied that there are no reasons, still less strong reasons, proved by the Defendant that would militate against the granting of an anti-suit injunction on established principles, and I am satisfied that in the exercise of my discretion it is appropriate to make an anti-suit injunction in the terms sought.

97 The final issue that arises is whether or not the injunction that should be made should be a final injunction or only an interim injunction. It was clearly envisaged from the order of Jacobs J in the procedure that was adopted with an expedited timetable for an *inter partes* hearing that what was contemplated would be a final injunction on the merits. In circumstances in which I am satisfied, as I am, notwithstanding the inevitable expedition necessitated by the commencement of the Chinese proceedings, which the Defendant has brought upon itself by commencing such proceedings in breach of the agreement to arbitrate, that the parties have had a full and proper opportunity to prepare for this *inter partes* hearing and advance any arguments and evidence that they wish, and in circumstances where the matter has been fully argued, if not exhaustively argued before me, I am satisfied that it is appropriate to grant a final anti-suit injunction in the terms sought and for the reasons that I have given.

98 If at any time the Defendant had considered that they were prejudiced, or could not be prepared for a final hearing at this hearing, then it would have been open to the Defendant, to ask, as often occurs, for the date to be adjourned to a later date to allow further consideration and/or evidence. On the contrary, the witness statement of Mr Sharma was put in in time in compliance with the order of Jacobs J, and it was not suggested at that stage, or at any stage thereafter, that the Defendant was not in a position to put forward all arguments and all evidence that it wished to do so.

99 Equally, in the light of the further evidence of Mr Green in his second witness statement, and indeed his third witness statement, both of which were served within the three days within which they were required to be served, had the Defendant considered that there was any need to put in further evidence, or for there to be an adjournment, they could, and I have no doubt would, have applied for such an adjournment. They did not do so, and I have heard the matter fully argued before me today. I am satisfied, in all the circumstances, that it is appropriate that the injunction should be a final order, and I so order.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge