Neutral Citation Number: [2019] EWHC 982 (Comm)

Case No: CL-2018-000788

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

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

Date: 16/04/2019

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court)

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Between :

PAN OCEAN CO. LTD	**Claimant**
- and -	
(1) CHINA-BASE GROUP CO., LTD (FORMERLY CHINA-BASE NINGBO FOREIGN TRADE CO. LTD)	**Defendants**
(2) BEIHAI XINAN PETROCHEMICAL CO., LTD	

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Richard Lord QC & Ben Woolgar (instructed by **Reed Smith LLP**) for the **Claimant**
Michael Collett QC & Charlotte Tan (instructed by **Shoreside Law**) for the **Defendants**

Hearing dates: 25-26 March

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Approved Judgment

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

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MR CHRISTOPHER HANCOCK QC

Christopher Hancock QC :

Introduction.

1. There are before me two applications. The first is for a declaration that the English Court has no jurisdiction, and an order setting aside the claim form. The second is for an anti-suit injunction preventing the continuance of proceedings in Singapore commenced by the Defendants against the Claimant.

2. The two applications raise similar considerations. Indeed, one has been described as the obverse of the other by the Claimant.

The facts.

3. The facts can be briefly summarised as follows:

   (1) On about 25 April 2016, a sale contract was entered into between Gunvor Singapore Pte Ltd ("Gunvor") and the First Defendant ("China-Base"), for the sale and purchase of 38,000mt, plus or minus 5% at seller's option, of light cycle oil. The contract was on cif terms, with delivery at one safe port Nansha, China. Payment was to be by way of irrevocable letter of credit. The loadport was to be any port in Indonesia, Malaysia, or the Philippines. On the Defendants' case, China-Base entered into that contract as agent of Beihai Xinan Petrochemical Co Ltd ("Beihai").

   (2) Prior to this, on about 13 April 2016, a charter contract had been entered into between Clearlake Shipping Pte Ltd, a company said to be associated with Gunvor, as charterer, and the Claimant, which was the demise charterer of the GRAND ACE 12 ("the Vessel"). That charter was evidenced by a recap telex of that date, and was on the BP Voy form with amendments, which were set out in the recap. Under the charter:

      (a) The load range was to be 1-3 safe ports Ningbo – Yizheng range including Zhoushan and/or in charterer's option 1-3 safe ports STS Taiwan, intention Taichung.

      (b) The discharging range was to be 1-3 safe ports STS Taiwan, intention Taichung and/or in charterers' option 1-3 safe ports Philippines, Bataan-Batangas range, including Subic Bay and/or in charterers' option mainland China Ningbo-Yizhang range including Zhoushan and/or in charterers' option 1-3 safe ports STS Kerteh/Singapore/Tanjung Pelepas/tanjung Langsat/ Pasir Gudang/Tangjun Bin/ Pengerang-Karimun-Nipah range including Batam.

      (c) The charterers' intentions were then recorded as being to load in Singapore area/Korea/Taiwan/Subic via terminal or STS; to proceed to the Philippines and receive approximately 50mt of MGO into one empty slop tank, without a bill of lading being issued, to then commingle the MGO with the previous cargo, and then to proceed to China, with redocumentation for the entire cargo prior to the arrival at the discharge port, showing the Philippines as the loadport for the entirety of the cargo, and the date of loading to be that when

the final 50mt was loaded in the Philippines. The charterers would then require only non-negotiable bills to be issued, and would use their best endeavours to return the original bills issued in relation to the Singapore etc cargo to the Owners. In the absence of the originals, the Owners were to furnish the charterers with a non negotiable copy for customs clearance at the discharge port.

(d) The recap stated: "GARB ENG LAW"

(e) The recap then went on to set out amendments to the standard BP Voy form. In relation to clause 49 of the BP Voy form, the recap stated that various words were to be added, as follows:

"... DISPUTE WHICH MAY ARISE OUT OF THIS CHARTER, SAVE AS HEREINAFTER PROVIDED. ANY DISPUTE ARISING OUT OF THIS CHARTER OF LESS THAN USD 50,000 SHALL BE REFERRED TO A SINGLE ARBITRATOR IN LONDON, SUBJECT TO THE LMAA SMALL CLAIMS PROCEDURE."

(f) Clause 49 of the BP Voy charter standard terms provides, under the heading "LAW" that:

"The construction, validity and performance of this Charter shall be governed by English law. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter."

(3) The Vessel loaded about 36,360 mt of light cycle oil and gas oil at Zhoushan, China and Taichung, Taiwan. Pan Ocean issued bills of lading which accurately reflected the loadports and nature of the cargo.

(4) The Vessel then proceeded to Subic Bay in the Philippines, where she loaded a further 50 mt of gasoil, for which no separate bill of lading was issued.

(5) In accordance with Clearlake's instructions, it is said that an agent of Pan Ocean issued switch bills of lading dated 7 May 2016 falsely naming the loadport for the entire cargo as Subic Bay, Philippines and mis-describing the entire cargo as light cycle oil.

(6) The Vessel proceeded to Nansha, China, where she discharged the cargo into bonded shore tanks. China-Base/Beihai neither presented any bills of lading nor gave any letter of indemnity ("LOI") to Pan Ocean or their agents.

(7) China-Base/Beihai sought to obtain customs clearance for the cargo using documents which misdescribed the loadport and nature of the cargo in the same manner as the Switch Bills.

4. It is China-Base/Beihai's case that the cargo was impounded by the China anti-smuggling bureau (in May 2016), on the grounds that the origin of the cargo was China and Taiwan rather than the Philippines as shown in the documentation presented for customs clearance. Cargo from the Philippines was subject to a lower rate of import duty than

cargo from China and Taiwan. China-Base/Beihai say that they were only able to obtain the release of the cargo after paying taxes, fines and other expenses.

5. China-Base/Beihai accordingly claim damages against Pan Ocean for loss and damage suffered by reason of false statements in the Switch Bills and cargo manifests as to the loadport and nature of the cargo.

6. China-Base/Beihai assert that they have never received the Switch Bills and have no reason to believe they were ever indorsed by Societe Generale (to whose order the cargo was consigned).

7. A writ in rem was issued in Singapore on 13 April 2017, and a Statement of Claim produced dated 14 July 2017. That writ was amended (to take out a claim for breach of contract which had originally formed part of the claim) on 7 February 2018. On 28 February 2018 the Vessel was arrested in Singapore, and on 3 March 2018 was released from arrest against a club letter of undertaking. Thereafter:

   (1) Pan Ocean entered an appearance on 7 March 2018.

   (2) China-Base/Beihai served their Statement of Claim on 21 March 2018.

   (3) Pan Ocean then made an application to set aside the arrest, by summons dated 4 April 2018. That summons sought various relief, as follows:

   "*Let all parties concerned attend before the Court on the date and time to be assigned for a hearing of an application by the Defendant for the following order(s):*

   1. That the Writ of Summons, Warrant to Arrest and Statement of Claim filed or issued in this action herein and the service thereof, be set aside pursuant to Order 12 Rule 7 of the Rules of Court and/or the inherent jurisdiction of the Court on the grounds that the Plaintiffs' claims do not fall within the admiralty jurisdiction of the Singapore High Court and/or the Plainiffs have failed to make full and frank disclosure of all material facts;

   2. That the Plaintiffs return forthwith to the Defendant or their solicitors the Letter of Undertaking dated 6 March 2018 issued by the Britannia Steam Ship Insurance Association Limited provided as security to the Plaintiffs for the release of the Vessel;

   3. That the Plaintiffs pay the Defendant damages for wrongful arrest of the Vessel in this action;

   4. That the time for filing and serving the Defence be extended pending the outcome of this application;

   5. The costs of and incidental to the action and of this application be paid by the Plaintiffs to the Defendant; and

   6. Such further and other relief as this Honourable Court deems fit.

   The grounds of the application are:

1. The grounds of the application are that the High Court's admiralty jurisdiction should not have been invoked in the present circumstances and/or there was wrongful arrest of the Vessel due to bad faith or gross negligence and/or there was a failure to disclose all material facts on the Plaintiffs' part. These grounds are elaborated on in the 1st Affidavit of Mr Sungkn, Park to be filed in support of this application, which draft is presently exhibited to the 1st Affidavit of Keng Xin Wee, Shereen, which has been filed herein."

(4) The summons was supported by an affidavit of Mr Park. In that affidavit, the allegation of wrongful arrest was set out under the general heading of wrongful arrest – bad faith or gross negligence. That affidavit contained allegations of bad faith against China-Base/Beihai, on the footing that at the time of the ex parte application for the warrant of arrest, no reference had been made to the existence of an arbitration clause in the contract which was said to exist between the parties; and no reference had been made to a potential time bar argument arising out of the fact that no arbitration claim had been made within the one year time limit. There was then a separate section dealing with want of full and frank disclosure. The Affidavit made no mention of a claim for damages.

(5) In May 2018, Gunvor obtained an ASI against the Claimant, based on the EJC said to form part of the bill of lading contract or charter between Gunvor and the Claimant. The bill of lading was the original switch bill; the charter was the Clearlake charter. The latter might have been relevant if Clearlake were Gunvor's agent in making the charter. That ASI has been continued up until the date of this judgment, as I understand the position.

(6) Accordingly, in May 2018, the Claimant knew that an EJC might be relied on.

(7) On 1 August 2018, there was a hearing to determine whether expert evidence was relevant and admissible in relation to customs clearance issues.

(8) Also in August 2018, a further ground was put forward in an affidavit of for the allegation of bad faith, namely that China-Base/Beihai were party to the customs fraud which was allegedly being perpetrated by Gunvor.

(9) Written submissions were put in on 10 August 2018 by the solicitors for the Claimant. Again, it was asserted that the arrest was wrongful, and involved malice or gross negligence, and cases relating to damages claims were cited. However, there was again no reference to a damages claim.

(10) The hearing of the application to set aside took place before the Assistant Registrar on 14 August 2018. I have seen a note of the hearing itself, in which the legal representatives of China-Base/Beihai make reference to a damages claim. However, the judgment, which was given on 26 October 2018, contains no reference to such a claim.

(11) The Claimant appealed against the decision of the Assistant Registrar. Shortly before the hearing of that appeal, which was due to take place on 14 December 2018, the current application for an ASI was issued (on 12 December 2018).

(12) On 17 December 2018, the Claimant's appeal against the order of the Assistant Registrar was determined, and was dismissed.

(13) On 20 December 2018, there was a pre-trial conference at which the Claimant indicated that it would seek a stay of the Singaporean proceedings on the basis of the EJC, and was ordered to make any application by early January 2019. That application was duly issued on 11 January 2019, within time.

(14) On 1 February 2019, Phillips J ordered an expedited hearing of these applications and gave consequential directions.

(15) The Claimant has been ordered by the Singaporean Court to file its evidence in support of its application to stay the Singapore proceedings in reliance on the EJC by 22 March 2019. I do not know what evidence was served.

(16) The hearing in Singapore is fixed to take place on 17 April 2019.

The issues on jurisdiction.

8. I can therefore summarise the issues on jurisdiction as follows:

(1) Was there a contract between the Claimant and the Defendants?

(2) If there was such a contract, what were its terms? In particular, did it include an exclusive jurisdiction clause ("EJC") in favour of the English Courts?

(3) Did that ECJ satisfy the requirements of Article 25 of the Recast Regulation?

9. If the answer to the above issues is that there was no valid and binding EJC, then it is common ground between the parties that the English Court has no jurisdiction, and thus it would be, strictly, unnecessary to move on to the second issue of whether an anti suit injunction should be issued. However, I consider in this judgment both the question of whether there is jurisdiction on the basis of an EJC, and the further question of whether, if there is, an anti-suit injunction should be issued.

10. However, Mr Collett QC, for China-Base/Beihai, submitted that I should not examine the question of whether there was in fact an implied contract unless I was satisfied that I had jurisdiction, since this would involve me in making observations which might be relied on in Singapore in circumstances in which I might in fact decide I had no jurisdiction. I agree with this concern. Accordingly, I propose to examine the question of whether the EJC here is binding, on the hypothesis that there was an implied contract of the sort alleged by the Claimant, without deciding that point at this stage.

The applicable approach.

11. The first question is as to the test that I am to apply in determining the application. Both parties agree that the guidance in *Kaefer Aislamentos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 is the most helpful guidance in this regard. In that case, the Court of Appeal considered recent Supreme Court authority on this question and concluded that:

"70 An opportunity to clarify the test arose in Goldman Sachs . Lord Sumption (giving a judgment with which Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Mance agreed), essentially repeated his formulation in Brownlie . To the extent that there was disagreement in Brownlie about the reformulation of the Canada Trust test the Supreme Court has now spoken with a single voice and the route forward lies with that reformulation. In paragraph [9] Lord Sumption stated:
"9. This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows:
"... (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."
It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."
71 Any dispute about whether the three-limbed test is obiter *has accordingly now vanished. The test has been endorsed by a unanimous Supreme Court. But the Court has not gone further than in Brownlie and has not expressly explained how the test works in practice nor as to what is meant by "* plausible *" nor how it relates to "* good arguable case *" nor how the various limbs interact with the relative test in Canada Trust ."*

12. The Court of Appeal then went on to consider the application of this test in cases which involved Article 25 of the Recast Regulation, stating as follows:

"81 This case concerns whether AT1 and Ezion were party to an exclusive jurisdiction clause set out in terms and conditions attached to the Purchase Order. It is common ground that Article 25 of the Recast Brussels Regulation , on prorogation of jurisdiction, applies. [1] This provision, in its earlier incarnations, [2] did not apply unless at least one of the parties was domiciled in the EU. But it now applies regardless *of the domicile of the parties. In Bols (ibid) the Privy Council cited earlier case law of the Court of Justice [3] which held that the relevant provisions (now Article 25) imposed on the court the duty of examining "* whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties *" and this had to be "* clearly and precisely demonstrated *". The purpose of the provisions was to ensure that the "* consensus *" between the parties was "* in fact *" established. The Court of Justice has however recognised that the manner of this proof is essentially an issue for the national laws of the Member States, subject to an overriding duty to ensure that those laws are consistent with the aims and objectives of the Regulation.*
82 The Privy Council in Bols held that the domestic good arguable case test had to be read in the light of the " clear and precise *" evidence requirement and in this manner it was consistent with the purpose behind the EU Regulation. Mr Cooper QC relied upon*

this to support his argument that, howsoever one cast the test, it nonetheless was not the minimal test advanced by the appellant. He pointed out that in Brownlie the judgment in Bols had been cited with apparent approval (see paragraph [62] above). An obligation to adduce clear and precise evidence to show jurisdiction was a test importing weight and substance. It was not for instance a test to be equated with that for summary judgment (as the Judge seemed to conclude in paragraph [83] of his Judgment). Mr Nolan QC for the appellant in an attempt to side-line the clear and precise standard argued that it did not apply because the rationale behind it (as explained in the case law of the Court of Justice) was that exclusive jurisdiction agreements amounted to a derogation from the normal rules determining jurisdiction, such as a defendant's domicile, and as a derogation from a basic norm it had to be strictly construed. This was why the arguably high hurdle of clear and precise had been introduced. But that logic was, he said, no longer apposite since the Recast Brussels Regulation now applied irrespective of a defendant's domicile. Now that the rules had changed the logic behind the " clear and precise *" rule no longer arose. Mr Cooper QC retorted that this was a distinction without a difference. Article 25 did not (could not) apply two rules: one where the defendant was an EU company and one where it was not. There had to be a single test.*

83 The Supreme Court in Brownlie and in Goldman Sachs seemingly approved Bols but did not address how the new three-limbed formulation took into account the provisions of the Recast Brussels Regulation, no doubt because it did not specifically arise on the facts of those cases. I agree with the analysis of Mr Cooper QC on this. I consider that in a case such as the present where the background legal context is Article 25 some regard must be paid to the fact that, as was held in Bols , the " clear and precise *" test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation. As with so much of the language used in this context, that which is "* clear and precise *" is not easy to define with precision. But I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the* prima facie *test (in limbs (i) and (ii)) is a* relative *one; and in so far as the court cannot resolve outstanding material disputes (limb (iii)) it affords an indication as to the sort of evidence that a Court will seek. I would not go much beyond this though."*

13. Applying that approach, I turn to the central issue between the parties, namely whether there was an exclusive jurisdiction clause in favour of the Courts of England and Wales which satisfies the requirements of Article 25 of the Recast Regulation?

Did any exclusive jurisdiction agreement that there was satisfy the requirements of Article 25 of the Recast Regulation?

Article 25.

14. I begin with the provisions of Article 25 itself, which provides as follows.

"Prorogation of jurisdiction

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those

courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

The authorities.

15. I was referred to a number of authorities on this question, and I deal with what I regard as the most relevant passages of each in turn (although not always the entirety of the text to which I was referred, which I have, however, read and taken into account), before turning to a consideration of the parties' respective submissions based on the cases. I deal with the authorities in chronological order.

16. My starting point is the decision of the ECJ in *Estasis Salotti di Colzani Aimo e Gianmario Colzani v RUWA Polstereimaschinen GmbH* (Case 24/76) [1976] ECR 1831. In that case, the ECJ said this:

"On the interpretation of Article 17 of the Convention in general
[6] The first paragraph of Article 17 of the Convention provides: "If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement confirmed in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction" .
[7] The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. ***By making such validity subject to the existence of an "agreement" between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established. The questions referred to the Court by the Bundesgerichtshof must be examined in the light of these considerations****." (my emphasis)*

17. Next, I was referred to the decision of the ECJ in *Galeries Segoura v Rahim Bonakdarian (Case 25/76) [1976] ECR 1851*, and in particular the following passage.

> *"The interpretation of Article 17 of the Convention in general*
> *[5] The first paragraph of Article 17 of the Convention provides: "If the parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement confirmed in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction" .*
> *[6] The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.* ***By making such validity subject to the existence of an "agreement" between the parties, Article 17 imposes upon the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established. The questions referred to the Court by the Bundesgerichtshof must be examined in the light of these considerations.***
> *The questions referred by the Bundesgerichtshof*
> *[7] The first question is whether the requirements of Article 17 of the Convention are satisfied if, at the oral conclusion of a contract of sale, a vendor has stated that he wishes to rely on his general conditions of sale and if he subsequently confirms the contract in writing to the purchaser and annexes to this confirmation his general conditions of sale which contain a clause conferring jurisdiction.*
> *[8] In accordance with the foregoing general considerations, it cannot be presumed that one of the parties waives the advantage of the provisions of the Convention conferring jurisdiction. Even if, in an orally concluded contract, the purchaser agrees to abide by the vendor's general conditions, he is not for that reason to be deemed to have agreed to any clause conferring jurisdiction which might appear in those general conditions. It follows that a confirmation in writing of the contract by the vendor, accompanied by the text of his general conditions, is without effect, as regards any clause conferring jurisdiction which it might contain, unless the purchaser agrees to it in writing.*
> *[9] The second question then asks whether Article 17 of the Convention applies if, in dealings between merchants, a vendor, after the oral conclusion of a contract of sale, confirms in writing to the purchaser the conclusion of the contract subject to his general conditions of sale and annexes to this document his conditions of sale which include a clause conferring jurisdiction and if the purchaser does not challenge this written confirmation.*
> *[10] It emerges from a comparison of the wording of the two questions and from the explanations given during the proceedings before the Court that the second of the two questions concerns the hypothetical situation of a sale being concluded without any reference being made at all to the existence of general conditions of sale. In such a case, it is patent that a clause conferring jurisdiction which might be included in those*

general conditions did not form part of the subject-matter of the contract concluded orally between the parties. Therefore subsequent notification of general conditions containing such a clause is not capable of altering the terms agreed between the parties, except if those conditions are expressly accepted in writing by the purchaser.
[11] It follows from the foregoing, in both of the alternative cases suggested by the Bundesgerichtshof, that a unilateral declaration in writing such as the one in the present case is not sufficient to constitute an agreement on jurisdiction by consent. However, it would be otherwise where an oral agreement forms part of a continuing trading relationship between the parties, provided also that it is established that the dealings taken as a whole are governed by the general conditions of the party giving the confirmation, and these conditions contain a clause conferring jurisdiction. Indeed, in such a context, it would be contrary to good faith for the recipient of the confirmation to deny the existence of a jurisdiction conferred by consent, even if he had given no acceptance in writing.
[12] It is therefore possible to give a single answer to the two questions referred to the Court as follows: in the case of an orally concluded contract, the requirements of the first paragraph of Article 17 as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser. The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction, unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction." *(emphasis mine)*

18. The European Court of Justice had to consider the question of whether an oral agreement, confirmed in writing, satisfied the requirements of the then equivalent of Article 25, in the case of *Berghoefer GmbH v ASA* [1986] 1 CMLR 13. The headnote in that case reads as follows.

"Reference from Germany by the Bundesgerichtshof (Supreme Court) under the Protocol to the EEC Judgments Convention .
Full faith and credit. Jurisdiction. Forum clause. Evidence in writing.Article 17(1) of the EEC Judgments Convention allows jurisdiction under a forum clause if jurisdiction was conferred by an oral agreement relating expressly to that point, written confirmation of the agreement was given by one party and received by the other, and the recipient raised no objection. [16]
The Court interpreted Article 17(1) of the EEC Judgments Convention in the context of a commercial agency agreement between a German agent and a French principal operative for some 20 years in the middle of which the parties had agreed orally that German courts should have exclusive jurisdiction over their disputes, the German company then sending the other a letter confirming the new arrangement but getting no acknowledgement of receipt, to the effect that the forum agreement is valid so long as it is proved that there was an oral agreement, that the written confirmation was sent and received and that the recipient raised no objection."

19. In the text of the judgment, the Court analysed the position as follows:

"[12] The Court observes that, for applying these provisions, reference should be made primarily to the whole of the Convention and its objectives in order to give them full effect.
[13] According to established case law (Salotti, Case 24/76 *;* Segoura, Case 25/76 *;* Porta-Leasing, Case 784/79 *;* Tilly-Russ, Case 71/83 *; the conditions to which Article 17 subjects the validity of jurisdiction clauses must be strictly interpreted in the sense that it is the function of these conditions to ensure that the parties' consent to such a clause is actually proved and that it is manifested clearly and exactly.*
[14] In this connection it should be observed that Article 17 of the Convention, unlike Article 1(1) of the Protocol annexed to it concerning persons domiciled in Luxemburg, does not require the written confirmation of an oral agreement to be given by the party against whom the agreement is to take effect. However it should be recognised, as the different observations submitted to the Court correctly point out, that it is sometimes difficult to determine in advance the party in whose favour a jurisdiction agreement is concluded, before proceedings are actually instituted.
[15] If it is actually proved that jurisdiction was conferred by an oral agreement relating expressly to this point and if the confirmation of the oral agreement given by one of the parties was received by the other, who raised no objection in reasonable time, this literal interpretation of Article 17 is, as the Court has already held in another context (* cf. *judgment in* tilly russ *), also in conformity with the function of this Article, which consists precisely in ensuring that consent between the parties is established. It would then be contrary to good faith for the party which raised no objection to dispute application of the oral agreement. In the present case it is unnecessary to decide whether and, if so, to what extent objections said to have been raised by the other party against the written confirmation of an oral agreement could be taken into consideration should the need arise.
[16] Therefore the reply should be that Article 17(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that the formal requirements therein laid down are satisfied if it is established the jurisdiction was attributed by an oral agreement dealing expressly with that point, that written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection." *(my emphasis)*

20. The next decision in time to which I was referred was the ECJ decision in *Benincasa v Dentalkit Srl* [1997] IL Pr 559, and in particular paragraphs 29-32. Those paragraphs provide as follows:

"[29]Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law. *(my emphasis)*
[30] That solution is consistent not only with the approach taken by the Court in Effer v. Kanter *, in which it ruled that the plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) of the Convention even*

when the existence of the contract on which the claim is based is in dispute between the parties, but also with the judgment in Case 73/77, Sanders v. Van der Putte , in which the Court held, in connection with Article 16(1) of the Convention, that, in the matter of tenancies of immovable property, the courts of the State in which the immovable property is situated continue to have jurisdiction even where the dispute is concerned with the existence of the lease.
[31] It must be added that, as the Court has held, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope (Case C-214/89, Powell Duffryn). Consequently, in the instant case it is for the national court to determine whether the clause invoked before it, which refers to "any dispute" relating to the interpretation, performance or "other aspects" of the contract, also covered any dispute relating to the validity of the contract.
[32] The answer to the national court's third question must therefore be that the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void."

21. I turn then to *Coreck Maritime GmbH v Handelsveem BV* (Case C-387/98) [2000] ECR I-9337, para 13, which was a case concerned with the requirements for proof of assent to a jurisdiction clause in a bill of lading. In that case the ECJ said:

"13 The court has held that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement between the parties', art. 17 of the Convention imposes on the court before which the matter is brought the duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by art. 17 is to ensure that consensus between the parties is in fact established (Estasis Salotti v RUWA (Case 24/76) [1976] ECR 1831 , para. 7, Segoura v Bonakdarian (Case 25/76) [1976] ECR 1851 , para. 6, and Mainschiffahrts-Genossenschaft eG v Gravieres Rhenanes (Case C-106/95) [1997] ECR I-911; [1997] CEC 859 , para. 15).
14 However, if the purpose of art. 17 of the Convention is to protect the wishes of the parties concerned, it must be construed in a manner consistent with those wishes where they are established. Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the fourth paragraph of art. 17 (Meeth v Glacetal (Case 23/78) [1978] ECR 2133 , para. 5).
15 It follows that the words 'have agreed' in the first sentence of the first paragraph of art. 17 of the Convention cannot be interpreted as meaning that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause states the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case….

22.By its third question, the national court essentially asks whether a jurisdiction clause which has been agreed between a carrier and a shipper and appears in a bill of lading is valid as against any third party bearer of the bill of lading or whether it is only valid as against a third party bearer of the bill of lading who succeeded by virtue of the applicable national law to the shipper's rights and obligations when he acquired the bill of lading.
23 It is sufficient to note that the court has held that, in so far as the jurisdiction clause incorporated in a bill of lading is valid under art. 17 of the Convention as between the shipper and the carrier, it can be pleaded against the third party holding the bill of lading so long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations (Tilly Russ , para. 24, and Castelletti , para. 41).
24 It follows that the question whether a party not privy to the original contract against whom a jurisdiction clause is relied on has succeeded to the rights and obligations of one of the original parties must be determined according to the applicable national law.
25 If he did, there is no need to ascertain whether he accepted the jurisdiction clause in the original contract. In such circumstances, acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it. The third party holding the bill of lading thus becomes vested with all the rights, and at the same time becomes subject to all the obligations, mentioned in the bill of lading, including those relating to the agreement on jurisdiction (Tilly Russ , para. 25).
26 On the other hand, if, under the applicable national law, the party not privy to the original contract did not succeed to the rights and obligations of one of the original parties, the court seised must ascertain, having regard to the requirements laid down in the first paragraph of art. 17 of the Convention, whether he actually accepted the jurisdiction clause relied on against him.
27 Accordingly, the reply to the third question must be that a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of art. 17 of the Convention." *(my emphasis)*

22. In 2009, Hamblen J decided the case of *Polskie Ratownictwo Okretowe v Rallo Vito* [2009] IL Pr 55. That case concerned the question of whether a jurisdiction agreement had been incorporated into a towage contract between the parties, which was made orally and then confirmed in writing. Hamblen J found that the clause did satisfy the formal requirements, stating as follows:

"Formal requirements
55 Even if the parties did agree to confer jurisdiction on the English Court, the defendants say that the requirements as to formality in art.23 are not satisfied in this case. They contend that there is no agreement in writing or even evidenced in writing within art.23(a). They point out that the defendants did not produce any document indicating that they had agreed to confer jurisdiction on the English Courts and did not sign any such document produced by someone else. Moreover, they say that such documents which were produced by Marint, namely the recap and the pro forma

TOWHIRE, were quickly challenged by the defendants on the basis that the documents sought to include terms which had not been agreed.
56 Under art.23(a) all that is required is that an oral the agreement be " evidenced in writing *". There is no need for the agreement to be signed: Powell Duffryn Plc v Petereit (C-214/89) [1992] E.C.R. I-1745; [1992] I.L.Pr. 300 . The writing relied on need not emanate from the party against whom the jurisdiction clause is being enforced: Berghoefer GmbH & Co KG v ASA SA (221/84) [1985] E.C.R. 2699; [1986] 1 C.M.L.R. 13 at [20], para [14] . Further, a failure to raise an objection within a reasonable time to the terms of a written confirmation following an oral agreement may establish the formalities required by Article 23: Berghoefer [1985] E.C.R. 2699; [1986] 1 C.M.L.R. at [21] , para.[15]; Iveco Fiat SpA v. Van Hool S.A. (313/85) [1986] E.C.R. 3337; [1986] 1 C.M.L.R. 57, 70–71, para [9]*[1] .
57 Here, the towage contract was finally agreed and concluded orally over the telephone at 19:30 GMT, when Mr. Palumbo confirmed the fixture to Mr. Heath. That agreement was then confirmed by Mr. Heath by the revised recap sent 20.42 GMT on February 4.
58 I am satisfied to the requisite standard of proof that the defendants failed to raise any objection within a reasonable time to the terms of the recap and the TOWHIRE form incorporated thereby.
59 This was a situation of urgency. Instructions to mobilize the tug had to be given almost immediately whereupon the tug would be delivered under the tow contract. The tow itself was to be attempted on 5 February.
60 It was the evidence of Mr Halfweeg that, as in this case, towage contracts are commonly negotiated and agreed over the telephone under considerable time pressure. In such circumstances, if a recap does not correctly reflect the deal, the practice is for the broker receiving the recap (here, CRS) to respond " immediately with a refusal, knowing that at that time the tug was mobilising *". The burden is on the receiving broker (CRS) and the party (the defendants) "* to immediately point out any error or omissions in the terms set out in the recap, absent which the recap is accepted as correctly setting out the terms of the contract *."*
61 The first defendant contends that it was engaged in dealing with the situation on the ground and could not be expected to respond immediately. However, their brokers, CRS, could be so expected and in any event there were likely to be responsible people in the first defendant's offices, such as their accountant Mr Margiottta.
62 I am accordingly satisfied to the requisite standard of proof that the recap, expressly incorporating Bimco TOWHIRE, provides the evidence in writing required by art.23(a)."

23. Next I turn to the decision of Males J (as he then was) in *BNP Paribas v Anchorage Capital* [2013] EWHC 3073 (Comm), where the learned judge said:

"44 Under Article 23(1), a jurisdiction agreement is effective if it is: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

[1] I was taken to *Iveco* as well, but the reference in the decision of Hamblen J (as he then was) accurately reflects the proposition for which the case stands, namely that an oral agreement as to jurisdiction later confirmed in writing may satisfy the requirements of Article 23 (now Article 25).

The purpose of these requirements is to ensure that there is consensus between the parties to the jurisdiction clause, and to this end for the purposes of Article 23(1)(a) it is the agreement to the jurisdiction clause (and not merely the clause itself) which must be in writing: Estasis Salotti di Colzani Aimo e Gianmario Colzani v RUWA Polstereimaschinen GmbH (Case 24/76) [1976] ECR 1831 ; and Galeries Segoura v Rahim Bonakdarian (Case 25/76) [1976] ECR 1851 ." *(my emphasis)*

24. Next in time is the decision of the Court of Appeal in *Antonio Gramsci Shipping Corp & Ors v Lembergs* [2013] 2 Lloyd's Rep. 295. In that case, the question arose of whether it was sufficient to satisfy the requirements of Article 25 that there had been an oral agreement which was thereafter confirmed in writing. The Court of Appeal confirmed that this sufficed to satisfy the requirements of the Article. They set out their reasons for so holding in the following paragraphs.

"35 I turn to the Brussels Regulation . The general rule under the Regulation is that jurisdiction is generally to be based on the defendant's domicile. The underlying principle is that it must always be so based, save in well defined situations in which the subject matter of the litigation or the autonomy of the parties requires a different linking fact: see Recital (11) to the Regulation. A further principle (see Recital (15)) is that it is necessary to minimise the possibility of concurrent proceedings.
36 Article 23 , which requires a consensus between the parties that a particular court is to have jurisdiction, like its predecessor Article 17 of the Brussels Convention , is based on the autonomy of the parties. Its material part provides:
"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing; or
[(b) and (c) are omitted]"
37 The purpose of Article 23 is to ensure that the parties have actually consented to the choice of jurisdiction. The decisions of the ECJ (now the CJEU) make it clear that, to be effective for the purpose of Article 23 , an agreement to confer jurisdiction must establish consensus between the parties "clearly and precisely": Case C-24/76 Estasis Salotti v RÜWA Polstereimaschinen GmbH [1977] 1 CMLR 345 and case C-25/76 Galleries Segoura SPRL v Rahim Bonakdarain [1976] ECR 1851 .
38 There is, however, a measure of flexibility. Although (see Case C-313/85 Iveco Fiat SpA v Van Hool NV [1986] ECR 3337) the ECJ stated that "the purpose of the formality requirement [in Article 23] is to ensure that the consensus between the parties is in fact established", an oral agreement conferring jurisdiction can suffice. This will be so where the oral agreement is later confirmed in writing by one party and the other party has raised no objection in sufficient time:Case C-221/84 Berghoefer GmbH v ASA SA [1986] 1 CMLR 13* .** **Briggs on Civil Jurisdiction and Judgment** ***(5th ed 2009, ed Rees) 178 states that the formal requirements "are a means to an end, and are not an end in themselves", and "the only question, sight of which must not be lost, is that the formal requirements are there to ensure that there was consensus. If the consensus can be clearly and precisely established by other means, they serve no additional function, and there is no further need to consider them".

39 Secondly, written consensus may exist in the absence of a binding contract: see Fentiman, International Commercial Litigation *(2010) at 2.40, giving a non-binding memorandum and an unsigned version of a contract which requires a signature as examples.*
40 Despite this measured flexibility, the jurisprudence of the ECJ regards the departures from the general rule of domicile-based jurisdiction, including Article 23 , as derogations. In that sense they are regarded as exceptions to the general rule, although to regard jurisdiction based on Article 23 as exceptional may (see Fentiman,* International Commercial Litigation *(2010) 2.42) risk placing an obstacle to giving effect to party autonomy.
41 There are also statements that departures from the general rule of domicile-based jurisdiction should be strictly construed (see Case C-24/76 Estasis Salotti v RÜWA [1977] 1 CMLR 345 at [7] and Bank of Tokyo-Mitsubishi v Baskan Gida Sanayi Pazarlama [2004] EWHC 945 (Ch) at [191]* per *Lawrence Collins J, as he then was) and interpreted in "keeping with the spirit of certainty". This means they should be interpreted so as to ensure that they are only applicable in clear cases and without having to delve into the merits of the underlying dispute: see Case C-159/97 Castelletti v Trumpy [1999] ILPr 492 at [48]-[49]. This last point has particular relevance when what is under consideration is an enquiry at the interlocutory stage in a case such as this one where there is a sharp conflict of evidence….

…62 I return to the question whether there is an underlying principle as to when "deemed consent" will or may suffice and the reference in Refcomp SpA v AXA Corporate Solutions Assurance SA [2013] ILPr 17 to the nature of the contract as relevant to this. My consideration of the cases has identified only one principle deployed for doing so. That is where the situation is one in which there has been a transfer of the contract or of all the rights and obligations for which it provides. That is not the position here."(emphasis again mine)

25. Mr Collett referred me, next, to the decision of the ECJ in *Profit Investment Sim SpA v. Ossi (Case C-366/13)* [2016] 1 WLR 3832.

26. I start with the Opinion of the Advocate General, which included the following passages.

"36 By its second question, which, although split into two parts, must be divided into three limbs, the referring court asks, in essence, first, whether the requirement of writing laid down in article 23(1)(a) of Regulation No 44/2001 is satisfied where a clause conferring jurisdiction is contained in a prospectus for the issue of securities, such as the CLNs at issue in the main proceedings, created unilaterally by the issuer of those securities, next, whether that clause may be enforced against any subscriber to those securities and, finally, in the event that the previous two question are answered in the negative, whether the insertion of a prorogation of jurisdiction clause in such a document is consistent with a usage common in international trade or commerce within the meaning of article 23(1)(c) of Regulation No 44/2001 .
37 That tripartite division of the question is necessary in so far as the first limb seems to me to be exclusively concerned with the validity of the prorogation of jurisdiction clause in the relationship between the parties to the contract containing that clause, whereas the second limb relates to whether that clause is transferable to successive purchasers of the securities. The third limb of the question includes both those issues and is concerned more generally with the effectiveness of that clause as against any purchaser or sub-purchaser of the securities.

1. The first limb of the second question
38 Case law has proved to be unstintingly rigorous in its interpretation of the ***requirements of form laid down in sub-paragraph (a) of the first paragraph of article 17 of the Brussels Convention, and then in article 23(1)(a) of Regulation No 44/2001 , the latter provision making the validity of the choice of forum clause subject to the existence of an agreement concluded "in writing or evidenced in writing".***
39 The court has held that the insertion of a clause conferring jurisdiction contained in the general conditions of sale of one of the parties, printed on the back of a written agreement, satisfies the requirement of writing only if the contract signed by both parties contains an express reference to those general conditions: Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v Rüwa Polstereimaschinen GmbH (Case 24/76) [1976] ECR 183 , para 10.
40 In the case of a contract concluded verbally, it has taken the view, leaving aside the case of an ongoing trading relationship between the parties, that a prorogation of jurisdiction clause could be effective only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale had been accepted in writing by the purchaser: Galeries Segoura SPRL v Société Rahim Bonakdarian (Case 25/76) [1976] ECR 1851 , para 12.
41 Focusing exclusively on the existence of consent to the prorogation of jurisdiction, the court has held, with respect to the first paragraph of article 17 of the Brussels Convention , that, by making the validity of a jurisdiction clause subject to the existence of an "agreement" between the parties, that provision imposes on the court before which the matter is brought the duty of examining first whether the clause was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated: Coreck Maritime GmbH v Handelsveem BV (Case C-387/98) [2000] ECR I-9337 , para 13 and the case law cited and the Refcomp case [2013] 1 All ER (Comm) 1201 , para 27. In accordance with its teleological method of interpretation, it has held that " article 23(1) of [Regulation No 44/2001] must be interpreted as meaning that, like the aim pursued by the first paragraph of article 17 of the Brussels Convention , ensuring the real consent of the parties is one of the aims of that provision": the Refcomp case, para 28 and the case law cited.
42 It therefore follows clearly from that case law that consent to a prorogation of jurisdiction clause cannot simply be tacit or inferred from the circumstances. Other than in the cases provided for in article 23(1)(b) and (c) of Regulation No 44/2001 , the effectiveness of such a clause is, on the contrary, subject to express consent given by using one of the formal modes of expression provided for in article 23(1)(a) and (2) of that Regulation.
43 However rigorous they may appear to be, those requirements of form are justified in my opinion, in so far as they provide a means of protecting the weaker party against the risk of insertion of a jurisdiction clause to which that party's attention has not been drawn in a sufficiently clear manner: the MSG case [1997] QB 731 , para 17.
44 In the light of those requirements, as interpreted by settled case law, the question raised by the referring court can only be answered in the negative, since the requirement of writing cannot be said to be satisfied solely by the insertion of the clause conferring jurisdiction in the memorandum created unilaterally by the issuer of the CLNs."

27. Turning to the judgment of the Court:

"The second question
22 By its second question, the referring court asks, in essence, whether article 23(1)(a) and (c) of Regulation No 44/2001 must be interpreted as meaning that a jurisdiction clause, such as that at issue in the main proceedings, satisfies the formal requirements laid down in article 23(1)(a) where (i) it is contained in a prospectus produced by the bond issuer concerning the issue of bonds, (ii) it is enforceable against third parties who acquire those bonds through a financial intermediary and (iii), in the event that the first two parts of the second question are answered in the negative, it corresponds to a usage in the field of international trade or commerce for the purpose of article 23(1)(c) .
23 As a preliminary point, it must be stated that, as regards the conditions for the validity of a jurisdiction clause, article 23(1) of Regulation No 44/2001 sets out in substance the formal requirements and mentions only one substantive condition relating to the subject matter of the clause, which must concern a particular legal relationship. Therefore, the wording of that provision does not indicate whether a jurisdiction clause may be transmitted, beyond the circle of the parties to a contract, to a third party, who is a party to a subsequent contract and successor, in whole or in part, to the rights and obligations of one of the parties to the initial contract: see, inter alia, Refcomp SpA v Axa Corporate Solutions Assurance SA (Case C-543/10) [2013] 1 All ER (Comm) 1201 , para 25.
24 However, article 23(1) of Regulation No 44/2001 clearly indicates that its scope is limited to cases in which the parties have "agreed" on a court. As appears from recital (11) of that Regulation, it is that consensus between the parties which justifies the primacy granted, in the name of the principle of the freedom of choice, to the choice of a court other than that which may have had jurisdiction under that Regulation: the Refcomp case, para 26.
25 In order to respond to the first part of the second question, it must be determined whether a jurisdiction clause contained in a prospectus unilaterally produced by the bond issuer concerning the issue of bonds meets the "in writing" requirement laid down in article 23(1)(a) of Regulation No 44/2001 .
26 The court has already held that that requirement is not fulfilled where a jurisdiction clause is included among the general conditions of sale of one of the parties, printed on the back of a contract, unless the contract contains an express reference to those general conditions: Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v Rüwa Polstereimaschinen GmbH (Case 24/76) [1976] ECR 1831 , para 10.
27 In addition, according to settled case law, article 23(1) of Regulation No 44/2001 must be interpreted as meaning that, like the aim pursued by the first paragraph of article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, ensuring the real consent of the parties is one of the aims of that provision (see, inter alia, the Refcomp case, para 28 and case law cited) and that, consequently, that provision imposes on the court before which the matter is brought the duty of examining whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated: see, inter alia,Coreck Maritime GmbH v Handelsveem BV (Case C-387/98) [2000] ECR I-9337 , para 13 and the case law cited, and the Refcomp case, para 27.
28 In the main proceedings, the clause conferring jurisdiction on the English courts is contained in the prospectus, a document produced by the bond issuer. It is not entirely clear from the order for reference whether that clause was included, or expressly

referred to, in the contractual documents signed upon the issue of the bonds on the primary market.

29 The answer to the first part of the second question is therefore that, where a jurisdiction clause is included in a prospectus concerning the issue of bonds, the formal requirement laid down in article 23(1)(a) of Regulation No 44/2001 is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus, which it is for the referring court to verify.

…

37 Consequently, the answer to the second part of the second question is that article 23 of Regulation No 44/2001 must be interpreted as meaning that a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, which it is for the referring to verify, that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause. …

… 51 In the light of all the foregoing considerations, the answer to the second question referred is that article 23 of Regulation No 44/2001 must be interpreted as meaning that:

—where a jurisdiction clause is included in a prospectus concerning the issue of bonds, the "in writing" requirement laid down in article 23(1)(a) of Regulation No 44/2001 is met only if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus;

—a jurisdiction clause contained in a prospectus produced by the bond issuer concerning the issue of bonds may be relied on against a third party who acquired those bonds from a financial intermediary if it is established, which it is for the referring to verify, that (i) that clause is valid in the relationship between the issuer and the financial intermediary, (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law, and (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause; and

—the insertion of a jurisdiction clause into a prospectus concerning the issue of bonds may be regarded as a form which accords with a usage in international trade or commerce, for the purpose of article 23(1)(c) of Regulation No 44/2001 , allowing the consent of the person against whom it is relied upon to be presumed, provided inter alia that it is established, which it is for the referring court to verify, (i) that such conduct is generally and regularly followed by the operators in the particular trade or commerce concerned when contracts of that type are concluded and (ii) either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that the conduct in question is sufficiently well known to be considered an established practice."

28. Finally, in this review of the case law, I refer to the decision of Leggatt J (as he then was) in *The Magellan Spirit* [2016] 1 CLC 480. At paragraph 7 of that decision, the learned judge said:

"7 There is no disagreement about the legal principles which govern the Owner's application for an anti-suit injunction and VSA's challenge to the court's jurisdiction. Taking the latter first, under the Lugano Convention VSA must be sued in Switzerland, where it is domiciled, unless the parties have made an agreement conferring jurisdiction on the English Court which satisfies the requirements of Article 23 of the Convention. Article 23(1) provides:
"If the parties, one or more of whom is domiciled in a member state, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing; …"
The meaning of Article 23 is determined by European law, and not by domestic English law: Powell Duffryn plc v Wolfgang Petereit (Case C-214/89) [1992] ECR I-1745 . In interpreting Article 23 (and the equivalent provisions of the Brussels Convention and Regulation) the Court of Justice has emphasised that the policy of the legislation requires the existence of the requisite agreement between the parties to be "clearly and precisely demonstrated": see e.g. Coreck Maritime GmbH v Handelsveem BV (Case C-387/98) [2000] ECR I-9337 , 9371, para 13." *(my emphasis)*

29. In addition to the above cases, I was referred to certain textbooks, as follows:

(1) First, the editors of *Dicey, Morris and Collins* make the following observations, at paragraph 12-135 (footnotes omitted).

"The formal requirement in the original version of the Brussels Convention was that the jurisdiction agreement be "in writing or evidenced in writing". But this requirement, especially as it was very strictly interpreted by the European Court, did not fit at all easily with the needs of international commerce, where the use of printed standard conditions, and communication by instantaneous means are common. As a result, the 1978 Accession Convention added that the agreement could be in a form which accorded with practices in international trade or commerce of which the parties were or ought to have been aware. This amendment was elaborated into its present form in the course of the negotiations for the original Lugano Convention, and in turn the equivalent provision in the Brussels Convention was brought into line with it in the 1989 Accession Convention. The Brussels I Regulation adopts the same form of words, but adds an elaboration of "writing" to deal with the increasingly common use of electronic means of communication. Thus there are now three (plus one more, under the Regulation) ways in which a jurisdiction clause may be effective. First, it may be in writing or evidenced in writing. The effect of the decisions on the unamended Brussels Convention was that this requirement would not normally be fulfilled by the sending of standard printed conditions unless the recipient signed a document which expressly referred to the conditions: in other words, the agreement to jurisdiction, rather than the identity of the court, was required to be in written form. In Iveco Fiat SpA v Van Hool NV the European Court considered the effect of a jurisdiction clause in a written agreement, which expressly

provided that it could be renewed only in writing. The agreement expired, but continued in effect for another 20 years without any written extension. The European Court held that if the applicable law (i.e. the law governing the original contract) allowed the contract to be renewed without complying with the express provision that the renewal had to be in writing, then the conditions of Art.17 of the Brussels Convention would be fulfilled: there would be an agreement on jurisdiction in writing or evidenced in writing. But if the applicable law did require the express provision to be complied with, the formal requirements of Art.17 would be complied with if one of the parties had confirmed in writing either the jurisdiction clause or the contractual terms which had been tacitly renewed (of which the jurisdiction clause formed a part) without any objection from the other party: in those circumstances the written confirmation would evidence the jurisdiction agreement."

(2) Secondly, I was referred to the most recent edition of *Briggs on Civil Jurisdiction and Judgments* (the 6th edition), at paragraph 2.131. That rather lengthy paragraph provides (with footnotes omitted) as follows (and I have added numbering, as did Mr Collett QC, for ease of reference).

"[1]It has been stated by the European Court that the purpose of the formality rules now in Article 25(1), is to establish 'clearly and precisely' the existence of consensus between the parties as to the jurisdiction of the particular court. In early case law, this led the Court to insist upon a strict application of the requirements, but it may be that the rules may, in certain circumstances, be interpreted more as signposts towards the existence of a consensus, which must be established, rather than as being mandatory in every case. For this reason, the older case law upon this point needs to be relied on with a little care. There is also a risk, not always appreciated, that the formal requirements are a means to an end; and that it is the end, not the means, which is the important thing.
[2]According to the earliest decisions of the Court, it was not enough that the reference to the jurisdiction of a court was written on paper. Rather, it was the agreement to it, or acceptance of it by the party to be bound, which was required to be in writing or evidenced in writing: to put the point simply, a jurisdiction clause may be in A's standard written terms, and B may have been furnished with a copy of these, but that does not establish B's (as distinct from A's) agreement to the designated court. The cases illustrate the development of the law. In Estasis Salotti v. RÜWA, it was held that a statement as to the jurisdiction of a court, clearly printed upon the reverse side of a written contractual document, did not satisfy the requirement of what at that time was Article 17 of the Brussels Convention that it be agreed in writing, so as to be binding on the other party. The gist of the reasoning was that, although the printed clause identified the court which was to have jurisdiction, the fact that it was so printed furnished no guarantee that it had come to the other party's attention, and offered no guarantee that he had agreed to it.
[3]Accordingly, and in the language of what is now Article 25 of the Regulation, it could not be said that the agreement on jurisdiction was in writing or evidenced in writing. To the same effect was Galeries Segoura v. Bonakdarian, where a 'confirmation in writing had been sent by one party to the other, stating that a sale was made upon general trading conditions, which themselves contained a provision on choice of court. It was held that this would not satisfy the

requirement that the agreement of the parties to the choice of jurisdiction be evidenced in writing unless accepted in turn in writing by the other party. In other words, the acceptance by the other party of the proposed jurisdiction had to be in writing, or had to be evidenced in writing. As it was put in The Tilly Russ: 'where a jurisdiction clause appears in the conditions printed on a bill of lading signed by the carrier, the requirement of an "agreement in writing" within the meaning of Article 17 of the Convention is satisfied only if the shipper has expressed in writing his consent to the conditions containing that clause, either in the document in question itself or in a separate document. It must be added that the mere printing of a jurisdiction clause on the reverse of the bill of lading does not satisfy the requirements of Article 17 of the Convention, since such a procedure gives no guarantee that the other party has actually consented to the clause derogating from the ordinary rules of the Convention.'

[4]In other words, the acceptance of the other party's written jurisdiction provision had to be in writing or evidenced in writing. If, therefore, a party signs a document which refers plainly enough to trading conditions which themselves contain an agreement on jurisdiction, this should satisfy the requirements of the Article. This is entirely consistent with the contention above, that it is the consent to or acceptance of it by the party to be to bound it, rather than the statement (by the other party) that a court is to have jurisdiction, which is required to be in writing. Though a party may propose written terms to another, these including among them an agreement on jurisdiction, the crucial question is whether the party against whom that jurisdiction is to be asserted signified his acceptance in a form which complies with what is now Article 25(1).

[5]However, for every case in which formality is insisted on, there will be another in which it is inappropriate to do so. In Berghöfer GmbH & Co KG v. ASA SA the Court accepted that an oral agreement, later confirmed in writing by one party and not apparently objected to by the other, could in principle be taken to satisfy what is now Article 25(1), even though there was no written consent from one of the parties. The basis for this result was thought to lie in the general principle of good faith: that it would in those circumstances be bad faith or bad form for the party seeking to take a point about the lack of formality to do so. In Iveco Fiat SpA v. Van Hool NV it was held that, where parties to a written contract which had contained an agreement on jurisdiction and by which is was clear that each was bound, continued to deal with each other without the written renewal which the contract provided for, the agreement on jurisdiction in the original contract continued to bind. The Court observed, in as clear a statement of principle as one may hope to find, that the 'sole purpose of the formal requirement… is to ensure that the consensus between the parties is in fact established and it imposes on the national court the duty of examining whether the clause conferring jurisdiction upon it was in fact the subject of such a consensus, which must be clearly and precisely demonstrated'. If the party responsible for drawing the contractual documents does not alert the customer to the fact that there has been a material change to the governing law and jurisdiction clause, with the consequence that the customer signs a contract in ignorance of this alteration from previous drafts, it may be bad faith to seek to hold the customer to his signature.[797]

[6]In Powell Duffryn plc v. Petereit, it was held that a jurisdiction provision contained in a company's articles of association bound shareholders in the company according to its terms, and that this proposition was unaffected by how

or when the shares were acquired. The reasoning was that company's constitutional documents are in the public domain, and that the shareholders agree to be bound by their contents. If it were to be asserted that the shareholder did not actually know what these documents contained, the retort is that he had the means of knowledge, and that is enough. If it follows from this that a party is bound by a written provision stipulating a court for the resolution of disputes, simply because it may be truthfully said that he had the means of knowledge of it, the law would have moved a very long way from its original position. The Court observed that the issue in Powell Duffryn plc was quite different from that which arises in connection with a printed and standard-form clause contained in another's standard conditions of trade; the proposition that a member of a company accepts and is bound by all the terms of his membership is quite distinct from the proposition that a person who makes a single contract on another's terms is, in the same way, bound by them. This seems correct.

[7]The requirement that the party to be bound have sufficiently agreed, in writing or in a way which is evidenced in writing, is principled, even where the facts make its application less so. A question may arise as to what is meant by 'writing'. Some legal systems have rules which withhold effect from a jurisdiction agreement if the print in which it is written is too faint or is too small for it to be reasonably legible. At first sight, there is no room for such reasoning within the framework of Article 25 for, as we shall see, national legal rules prescribing the formalities required for the validity of an agreement may not be added to those set out in Article 25. But if the writing is too small or otherwise illegible, or is written in an exotic language which means that it is completely camouflaged from the other party, even if there is writing by the party to be bound, it could be argued that it would be bad faith for the proferens to rely on it. If this is accepted, it may also offer a way forward to the problem which arises when the agreement on jurisdiction is printed in a language which, to the knowledge of the proferens, the other party cannot read or understand. The overriding need is to demonstrate that the agreement on jurisdiction was the subject of consensus; and the requirement of writing is, as was said above, a means to an end, rather than an end in itself. If the party proposing the term knows that the other cannot have known what he was being invited to consent to, it would arguably be wrong to hold the other to the jurisdiction which, as the proposer knows, the other did not agree to.

[8]Article 25(2) extends the scope of 'writing' to include communication by electronic means which provide a durable record of the agreement. This doubtless includes fax and (if anyone still uses it) telex transmission. It must include email, on the footing that the message is stored, or is capable of being stored, and can also be printed to make a hard and durable copy of what has been agreed. It is less likely that it extends to a voicemail or text message, neither of which provides a durable, as opposed to an ephemeral, record, even if voice recognition software may produce a written version of the spoken word. It may also explain why a jurisdiction agreement, appearing or made accessible by clicking on a service provider's website, will bind a person who makes a contract on, or otherwise uses, that website.[803] If the general question is whether the customer appears to have agreed to the jurisdiction, and the answer is affirmative, that should be sufficient to meet the requirements of Article 25."

The parties' respective submissions.

30. Based on the above cases, Mr Lord QC, for the Claimant, put forward five propositions in oral argument, as follows:

    (1) The EU jurisprudence on Article 25 and its predecessors showed that the Court was not concerned with particular formalities, but must establish consensus clearly and precisely. In support of this proposition, he relied on *Antonio Gramsci* and *Coreck*.

    (2) The question of whether the requirement is satisfied is one for the national Court applying national law, although subject to its overriding duty to ensure that those laws were consistent with the aims of the Regulation. In this regard, he referred to paragraphs 81-83 of *Kaefer*, which I have set out above, and also *Bols*, along with the decision in the *Benincasa* case, and in particular paragraphs 29-32 of that case, as also set out above.

    (3) In the context of the present case, the rules of English law on the implication of contracts, which would only allow such implication where it was necessary to do so, did not derogate from the Regulation. He did not cite authority in this regard; but submitted that it flowed as a matter of principle.

    (4) There is no rule that consensus can only be established by consent in writing. In this regard, he relied on paragraph 12-135 of *Dicey*, and the decisions in *Iveco*, *Berghoefer* and *Polskie*.

    (5) Most of the EU and English cases were concerned, not with the current situation, but with cases where the only issue was assent in writing. Accordingly, the language of the cases was framed with that in mind. He relied on *Estasis* and *Galeries Segura* in this regard, and sought to distinguish *Profit* and *BNP*, essentially on the basis that each of these latter cases turned on its own particular facts.

31. Mr Collett QC, for his part, addressed each of these propositions, and sought to negative them:

    (1) In relation to the first proposition, then he submitted that, whilst it was clear that the EU jurisprudence required consent to be clearly and precisely demonstrated, the formal requirements in Article 25 were the means to achieve this. In this regard, he relied on a number of passages from the authorities:

        (a) First, he took me to paragraphs 19 to 27 of the *Profit* case, and paragraph 24 of the Attorney-General's opinion in that case, arguing that those paragraphs showed that the purposes of the formal requirements in Article 25 was to establish the fact of consent.

        (b) Next, he referred to paragraph 38 of the Attorney-General's opinion in *Berghoefer*, contending that this also supported the conclusion that the requirements of writing were in fact necessary to establish consent, so that the Regulation was indeed concerned with formalities. In fact, in his submission, *Berghoefer* was simply an orthodox application of Article 25,

as could be seen from a consideration of other, equally authoritative versions of the Regulation in other languages which referred to the agreement as needing to be "in writing or confirmed in writing".

(c) Both *Estasis* and *Galeries Segoura*, he contended, supported his submission, as could be seen from the reliance on those authorities by Males J (as he then was) in *BNP*.

(d) Paragraph 35 of the *Polskie* decision was, he said, supportive of his position. That paragraph simply states that "*In this regard, art.23 has two elements. First, there must be an agreement between the parties to confer jurisdiction on the court. Secondly, that agreement must also satisfy the requirements as to formality set out in sub-paragraphs (a), (b) or (c).*"

(e) He also relied on paragraph 12-135 of *Dicey*, contending that it did not establish the proposition for which Mr Lord QC contended.

(f) He focused on the first, fourth and seventh paragraphs of the extract from *Briggs* that I have set out above, all of which, he said, were consistent with the proposition that the cases did indeed show the importance of the formalities in establishing consent to the jurisdiction agreement. He also pointed out that the paragraph in *Briggs* which had been relied on in *Antonio Gramsci* had been amended, to make it rather less black and white.

(g) Finally, as regards *Coreck*, he argued that this was, in the main, to do with succession to the rights of a prior holder of a bill. Where, as here, the question was as to whether an original party to a contract said to be implied from conduct on the terms of the bill of lading was bound by an EJC in the bill, then that case made it clear the provisions of what is now Article 25 had to be satisfied.

(2) Turning to Mr Lord QC's second submission, he submitted that the authorities, and in particular *Dicey* 12-130 and paragraph 36 *of Polskie* (which states that*: "As to the need for agreement - the claimant must show that both the parties " clearly and precisely " consented to the alleged jurisdictional agreement. In a case, such as this, where a party alleges that it never accepted the clause, the task of the Court is to determine if there was sufficient consensus between the parties as a question of fact, without recourse to any rules of national law: see Dicey, Morris & Collins The Conflict of Laws 14th edn, para.12-108"*, showed that Article 25 was to be given an autonomous meaning. *Kaefer*, in his submission, dealt with the mode of proof, not the test itself.

(3) As to the third proposition put forward by Mr Lord QC, Mr Collett QC submitted that it was striking that no authority was put forward for this proposition and indeed that no case had been identified in which a contract which was said to have been made entirely by conduct was sufficient to satisfy the requirements of Article 25. In fact, he submitted, the opinion of the Advocate General in *Profit*, at paragraph 42, (which is set out above) ran clearly counter to this third proposition.

(4) Mr Collett QC then submitted that there was indeed a requirement that the agreement to the clause was in writing or evidenced (or confirmed) in writing. The EU case law which I have set out above was consistent on that point, and the fact that English law recognised that contracts could be implied from conduct did not derogate from this.

(5) Finally, Mr Collett QC agreed that the cases have focussed on the need for writing, but argued that that was simply because that was what Article 25 required the Court to do.

Discussion and conclusions.

32. I turn to set out my conclusions on this issue. In my judgment, the cases show the following.

(1) The fundamental issue is clearly whether consent to the EJC has been clearly and precisely demonstrated: see *Estasis*, at paragraph 7, *Galeries Segoura*, at paragraph 6, *Berghoefer*, paragraph 13, *Benincasa*, paragraph 29, *Coreck*, paragraph 13, *BNP Paribas*, paragraph 44, *Antonio Gramsci*, paragraph 37, *Profit*, paragraph 41 of the Attorney General's Opinion and paragraph 27 of the judgment of the Court, and *The Magellan Spirit*, paragraph 7.

(2) The purpose of the formal requirements in Article 25 is to establish such consent, clearly and precisely. The requirement of writing is not satisfied by the fact that the clause itself is in writing; the consent must be in writing or evidenced (or confirmed) in writing: see in particular *BNP Paribas*, a case by which I am bound, but with which I respectfully agree. It is clear from the European authorities that the purpose of the formal requirements in the Article is to establish consent to the necessary degree of certainty.

(3) Whilst it is clear that there is a "degree of flexibility", to adopt the phraseology of Professor Briggs in his helpful exposition of the authorities, then this cannot be taken too far. In my judgment, the authorities show that if there is no written agreement, then there must at least be written confirmation which evidences consent. Those authorities of which *Antonio Gramsci* is perhaps the most recent example, can be explained on one of two bases. The first is, quite simply, on a literal reading of the Regulation, which provides for the case where an agreement which is not itself in writing is then either confirmed or evidenced in writing. The second is on the basis of the doctrine of good faith, whereby the denial of the agreement, when it would otherwise be clearly established, by reliance on the want of compliance with the formal requirements of the Article, would amount to bad faith: see *The Antonio Gramsci* itself and *Berghoefe*r, at paragraph 15.

(4) There is, as Mr Lord QC very fairly accepted, no authority which would go so far as to say that agreement to an EJC which was implied solely from the conduct of the parties suffices for the purposes of compliance with Article 25. In my judgment, this is a telling consideration. On the face of it, then where there is no agreement (in the sense of consent) in writing or evidenced (or confirmed) in writing, then there is no sufficient compliance with Article 25(1)(a) (the only

provision relied on by the Claimant here). That analysis is also in line with what was said by the Attorney General at paragraph 42 of his opinion in *Profit*.

(5) In addition, I would agree with Mr Collett QC that the Article is indeed concerned with formalities, since otherwise there would be no purpose in including the various limbs in Article 25(1). The fact that the Article is concerned with formalities for a particular purpose – namely to establish consent clearly and precisely – does not detract from the proposition that the Article is indeed concerned that such formalities should be complied with.

33. Accordingly, I conclude that, on the assumption that there was a contract between the parties implied from the conduct of those parties at the discharge port, that was not sufficient to satisfy the requirements of Article 25 of the Regulation. Accordingly, I hold that there was no binding EJC on the facts of this case.

34. As I noted earlier in this judgment, I have considered the above on the basis of an assumption made in favour of the Claimant, namely that there was an implied contract. I do not intend to consider whether that assumption is in fact well-founded. That is because I agree with Mr Collett QC that, having determined that I do not have jurisdiction, it would be undesirable for me to express views on the very issue that the Singapore Court will be considering.

Issue 2: If there was a binding EJC, should an anti suit injunction ("ASI") be granted.

35. It follows from what I have held thus far that there is no basis for the grant of an ASI. However, if, contrary to the views that I have expressed to date, there was in fact an EJC, the further issue arises of whether an anti-suit injunction ("ASI") should be issued to give effect to the agreement between the parties established by reference to that EJC.

36. For the reasons I set out in the following paragraphs, I have come to the conclusion that, even if any EJC was concluded between the parties, then I would not be prepared to grant an ASI to give effect to that agreement.

37. In this regard, there were two issues between the parties:

(1) Was there a submission by Pan Ocean to the jurisdiction of the Singapore Courts?

(2) Was there a delay of such magnitude to mean that I should not exercise my discretion to grant an ASI?

38. Although these were treated as independent questions, in my judgment then they are in fact interrelated, for the reasons I set out below.

<u>Submission to the jurisdiction of the Singaporean Courts.</u>

39. Both parties were in agreement that the question under this head was whether, applying English principles of law, there had been a submission to the jurisdiction. In that regard, I was referred to the decision of the Court of Appeal in *Henry v Geoprosco* [1976] QB 726, where the Court of Appeal said:

"Mr. Ross-Munro put in the forefront of his submission that the question to be determined had to be decided not by reference to the law of Alberta but by reference to the English rules of conflict of laws. This submission, in our judgment, is plainly correct. Mr. Pain did not seek to contend otherwise. Accordingly, as Cairns L.J. pointed out at an early stage of the argument, the question which of the conflicting views as to the law of Alberta is correct is irrelevant. In any event, any conflict could not be satisfactorily resolved on the hearing of this appeal, even if we were minded to grant the plaintiff the extreme indulgence of adducing this further evidence at this late stage. It is not necessary, therefore, to say anything further on this issue."

40. Despite this agreement, I was provided with a number of reports from Singaporean lawyers. Those reports did not really assist me, save in one respect, for two reasons:

(1) The first is that the parties were agreed that the relevant question was whether, applying English principles, there had been a submission. The rules of Singapore law were therefore in fact irrelevant.

(2) The second is that the Singapore rules appeared to be the same as the English rules, in any event. The difference between the experts was not as to the relevant principles, but as to the application of those principles to the facts of this case. This latter is, in my judgment, a matter for me.

41. The one respect in which the reports were of assistance was that both experts were in agreement that, as a matter of Singapore law, once the jurisdiction dispute had been determined on appeal then, unless the earlier acknowledgement of service was withdrawn, the Claimant was to be deemed to have submitted to the jurisdiction in Singapore. Thus, it would appear to be common ground that, in Singapore, there has now been a submission to the jurisdiction under Singaporean procedural rules.

42. The English rules of conflict of laws were, as both parties accepted, those set out in *Willams & Glyns Bank v Astro-Dynamico* [1984] 1 WLR 438. There, the House of Lords drew a distinction between invoking the jurisdiction to determine jurisdiction, and invoking the jurisdiction to determine the merits. In particular, Lord Fraser said:

"The argument to the contrary which was accepted by Bingham J. was that, if the court were to entertain the application for a stay, it would be assuming that it had jurisdiction to entertain the action. With the greatest respect to the learned judge, I agree with Robert Goff L.J. in the Court of Appeal that that view is mistaken. The fallacy is in confusing two different kinds of jurisdiction; the first is jurisdiction to decide the action on its merits, and the second is jurisdiction to decide whether the court has jurisdiction of the former kind. The distinction was explained in Wilkinson v. Barking Corporation [1948] 1 K.B. 721 , 725 by Asquith L.J. who said:
"The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction: the Supreme Court may, by statute, lack jurisdiction to deal with a particular matter — in this case matters including superannuation claims under section 8 — but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matters. By entering an unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), but not to the first (which does not)."
By entertaining the application for a stay in this case, the court would be assuming (rightly) that it has jurisdiction to decide whether or not it has jurisdiction to deal with

the merits, but would not be making any assumption about its jurisdiction to deal with the merits."

43. Mr Collett QC then referred me to the decision in *Golden Endurance Shipping v RMA Watanya* [2017] 1 All ER (Comm) 438, a decision of Phillips J. In paragraph 29 of that case, the judge said:

"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)."

44. *Henry v Geoprosco* has been statutorily reversed, in this jurisdiction, by s.33 of the Civil Jurisdiction and Judgments Act 1982, which states that a party shall not be taken to have submitted to the jurisdiction simply because that party applies for a stay of the proceedings in favour of arbitration. However, there is no evidence before me that there is any similar provision in Singapore.

45. Based on the above principles, Mr Collett QC submitted (in very brief summary) that:

(1) There had been a submission to the jurisdiction, in accordance with the principles in *Astro Dinamico*, because the Claimant, during the course of its challenge to the jurisdiction of the Singapore Court, went beyond the taking of purely defensive steps and positively invoked the jurisdiction of that Court, in particular by making a positive claim for wrongful arrest. He submitted, in reliance on *Joseph on Jurisdiction and Arbitration Agreements*, para 12.130, that a party who has submitted to the jurisdiction will generally be unable to obtain an ASI. That paragraph provides (footnotes omitted) that:

"An application to restrain a party from taking steps in proceedings brought in breach of contract ought to be brought promptly and before those proceedings are too far advanced. The longer a party delays in bringing the application the more likely it is that a court will refuse to grant an injunction. Further, voluntary submission to jurisdiction of the foreign court is likely to weigh heavily against the grant of a restraining injunction. Indeed it ought generally to be fatal to an injunction application brought on the grounds of the invasion of a legal right, if the party has assented to the breach and has submitted to the foreign court's jurisdiction."

(2) My attention was also drawn to *Briggs, Civil Jurisdiction and Judgments*, at p. 550, where the author states that:

> *"No reported case holds, clearly and precisely, that an applicant will forfeit the right to ask for an injunction if he has already submitted to the jurisdiction of the foreign court. But if the applicant has taken a step in the foreign proceedings which goes beyond a challenge to that court's jurisdiction, it will be more difficult to persuade an English court that the respondent should now be restrained from continuing with those proceedings. Whether this is put on the basis of the applicant's having waived his legal (or equitable) right not to be sued before the foreign court, or by contending that by appearing to answer the merits of the claim against him the respondent is estopped from complaining to the English court about the proceedings in which he has appeared, or on some other basis, it still reflects broad common sense. It also reflects the fundamental rule of English law that, once a defendant has submitted to the jurisdiction of the English courts, he cannot then dispute its jurisdiction over him. Of course, there will be room for debate where the applicant has appeared before the foreign court in such a way as makes it unclear whether he should be taken to have submitted to its jurisdiction, and there may still be exceptional cases in which a submission by appearance should not forfeit the right to apply for an anti-suit injunction. But the principle of the matter seems reasonably clear: an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court."*

(3) There had been a submission to the jurisdiction by virtue of the fact that the Claimant had now made an application in Singapore to stay the proceedings there on the basis of the alleged EJC, this being a situation that is on all fours with that in *Henry v Geoprosco*, (as explained again in *The Golden Endurance*) where the application to stay in favour of arbitration was a submission on the merits.

46. Conversely, Mr Lord QC submitted (again, in outline) that there was here no submission.

(1) In relation to the steps taken prior to the determination of the appeal in relation to the arrest proceedings, he submitted that these were purely defensive. The reference to wrongful arrest was not to a positive claim for damages for such wrongful arrest, but simply a reference to wrongful arrest as a ground for discharging the arrest and security.

(2) In relation to the application in Singapore to stay in reliance on the EJC, he submitted that this was necessary by reason of the fact that, if no such application were made, the Claimant ran the risk of having a default judgment entered against it.

47. Mr Lord QC also took issue with the absolute nature of the statement in *Joseph*, above. In his submission, the question of submission was simply part of the overall discretionary exercise. In my judgment, he is right that the question of submission is simply part of the overall discretionary enquiry. In this regard, I prefer the statement of Professor Briggs to that of Mr Joseph QC.

48. I have set out the relevant factual chronology earlier in this judgment.

49. On the basis of the overall chronology, Mr Collett QC submitted that there had clearly been a submission to the jurisdiction in Singapore in accordance with the English law

principles set out above. In this regard, he argued that the claim for damages for wrongful arrest was a counterclaim; that it was a positive invocation of the Singaporean jurisdiction; and that, because such a claim would fall within the EJC it was a clear election not to rely on the EJC in this regard.

(1) As to the proposition that the making of a counterclaim was a submission to the jurisdiction, he relied on *CNA International Ltd v Office Depot International* [2005] EWHC 456, and *Cheshire and North on the Conflict of Laws*, 15th ed, p.333, fn 113. I accept this proposition, and indeed I did not understand it to be disputed by Mr Lord QC.

(2) I would also accept the second proposition. If there was a clear submission of a positive claim to the jurisdiction of the Singapore Court, then in my judgment this would either amount to an election not to rely on the provisions of the EJC, or would at the very least amount to a very strong reason for refusing an application for anti-suit relief in reliance on the EJC. This, in my judgment, follows from the passages in *Joseph* and *Briggs* to which I have already made reference; though, as I have said, I regard Professor Briggs' statement of the principle as preferable.

50. The real dispute between the parties (and indeed between the Singapore law experts) was whether, on the facts, the Claimant had made a counterclaim for damages and thus gone beyond what was necessary for the purposes of the challenge to jurisdiction.

51. It was the submission of Mr Collett QC that there was, quite clearly, a claim for damages for wrongful arrest. In particular:

(1) The application to release the arrest included, in addition to the paragraph seeking a release from arrest, a paragraph asking for an order that the arrest was wrongful. That, it was submitted, could only be interpreted as a claim for wrongful arrest, which in turn would require a showing of either gross negligence or mala fides.

(2) The fact that the affidavit in support of the application did not make a specific claim for damages for wrongful arrest did not detract from the fact that the claim had been made in the application notice. That affidavit, and the further affidavit sworn in June 2018, included allegations that the arrest had been made grossly negligently and in bad faith, and no sensible party, who only wished to set aside the arrest and did not wish to claim damages, would make such allegations, since it would only be necessary to show non-disclosure of a knock out point[2] to justify setting aside.

(3) It was also clear from the record of the hearing before the Assistant Registrar that China-Base's Singaporean lawyers understood there to be a claim for damages for wrongful arrest.

52. Mr Lord QC, conversely, submitted that there was no positive claim for damages for wrongful arrest.

(1) He accepted that the application notice included a claim for an order that the arrest was wrongful. However, in reliance on the report of Mr Seah, he submitted that this reference was simply to relief "consequential" on the release of the arrest, and

[2] It was common ground between the parties that in Singapore, the point not disclosed had to be a knock out point to justify setting aside of the arrest.

was not intended to be, and should not be understood as, a claim for damages for wrongful arrest.

(2) He relied on the fact that the affidavits sworn by the Claimant made no claim for damages. Instead, the wrongful conduct alleged by the Claimant was, in each affidavit, he argued, said to be a ground for the discharge of the arrest.

(3) He relied on the fact that neither of the judgments of the Court (at first instance and on appeal) made any reference to any claim for damages for wrongful arrest.

53. I have concluded that on this point, on balance (although not without some degree of hesitation) the submissions of Mr Lord QC are to be preferred:

(1) On its own, I would have concluded that the application notice was reasonably to be interpreted as making a claim for damages for wrongful arrest. I do not accept Mr Seah's evidence to the effect that a claim for wrongful arrest can be made as "consequential relief" upon the discharge of the warrant of arrest. That would not normally be the case, and I have been shown no Singaporean authority which would support this proposition.

(2) However, the application notice cannot be read on its own and in the abstract. In the context of the supporting affidavits, I take the view that the reference to wrongful arrest is indeed to be regarded as referable to the relief that is sought, which is solely the setting aside of the warrant of arrest. The fact that China-Base/Beihai's lawyers seem to have understood the reference differently does not alter my view.

54. Accordingly, I hold that there was here no submission during the course of the proceedings challenging jurisdiction.

55. That leaves the question of whether the application to stay the Singaporean proceedings on the basis of the EJC is, as a matter of English law, sufficient to amount to a submission to the jurisdiction so as to preclude the grant of an ASI. It clearly is a submission as a matter of Singaporean law. However, the question remains of whether, applying English law, there has been a sufficient submission by reason of the failure to apply to withdraw the earlier acknowledgement of service coupled with the application to stay to justify the refusal of an ASI.

56. In this regard, I do not regard the decision in *The Golden Endurance* as determinative. That was a case concerned with enforcement, not with whether an ASI should be issued. It seems to me that, as a matter of English law, and in the light of the reversal of *Henry v Geprosco*, a party who applied to Court simply to seek to enforce an agreement to sue or arbitrate elsewhere, ought not to be held thereby to have submitted to the jurisdiction. However, I do not need to decide this, and I do not, since it is in my view simply one further consideration to be weighed in the balance in relation to the grant of an ASI as a matter of discretion.

57. I have concluded that, in relation to both of the matters relied on by Mr Collett QC, the taking of these steps was not sufficient to constitute an absolute bar to the grant of an ASI. Instead, in my judgment, the taking of these steps forms part of the overall discretionary enquiry that I am engaged in as to whether or not an ASI should be granted.

58. I turn to the second discretionary factor relied on by China-Base/Beihai, which is excessive delay in the bringing of the application for anti-suit relief, coupled with the steps taken in Singapore.

59. My starting point is the decision in *The Angelic Grace* [1995] 1 Lloyd's Rep. 87, and in particular the statement of Lord Justice Millett, as he then was, which is the *locus classicus* of the law in this area. That passage reads as follows:

> *"In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank N.A. v. AeakosCompania Naviera S.A., [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."*

60. Accordingly, an injunction should be granted, provided that the application is sought promptly and before the foreign proceedings are too far advanced. This approach has been adopted and applied in numerous cases, which were put before me as decisions on their particular facts. I do not think that it is profitable to go through numerous decisions in which the same principles are applied to the facts. For present purposes, in my judgment, the most helpful recent and authoritative decision is that of the Court of Appeal in *Ecobank v Tanoh* [2016] 1 WLR 2231. As recorded in the headnote, in that case the Court of Appeal held that:

> *"both general discretionary considerations and the need for comity required that an application for an anti-suit injunction had to be made at an early stage; that the longer an action continued without any attempt to restrain it the less likely a court was to grant an injunction; that an applicant who did not apply for an injunction until after judgment was given in the foreign proceedings was unlikely to succeed unless he could not have sought relief before the judgment was given, either because the relevant agreement was reached post-judgment or because he had no means of knowing that the judgment was being sought until it was served on him; that when considering whether to grant an anti-enforcement injunction the court would have regard to all relevant considerations, including the extent to which the respondent had incurred expense prior to any application being made, the interests of third parties, including in particular the foreign court, and the effect of granting an anti-enforcement order; that time during which the foreign jurisdiction was challenged fell to be taken into accont when considering delay; that it was not a precondition to the refusal of an injunction that the respondent should establish detrimental reliance; and that, in the circumstances, it had been open to the judge to hold that in the light of the claimant's delay injunctive relief should be refused"*

61. That was of course an application to enjoin enforcement proceedings, and was thus an *a fortiori* case to the present. However, the Court of Appeal's approach was, in my

judgment, equally apposite to an anti-suit injunction application seeking to prevent the continuance of foreign proceedings prior to judgment. The Court of Appeal summarised the position as follows:

"122 I do not accept that delay was wholly irrelevant because (i) Mr Tanoh was aware from an early stage that Ecobank claimed that the disputes should be submitted to arbitration and (ii) Ecobank objected to the jurisdiction of the Togolese and Ivorian courts on that ground. An injunction is an equitable remedy. Before granting it the court must consider whether it is appropriate to do so having regard to all relevant considerations, which will include the extent to which the respondent has incurred expense prior to any application being made, the interests of third parties, including, in particular, the foreign court, and the effect of making such an order in relation to what has happened before it was made.
123 A relevant consideration, particularly in relation to interlocutory relief, as was sought in the present case, is whether the party seeking an injunction has acted with appropriate speed. The longer a respondent continues doing that which the applicant seeks to prevent him from doing, the greater the amount of labour and cost that he will have expended which could have been avoided. There is, I accept, some force in Mr Coleman's submission that Mr Tanoh ought not to be able to pray in aid the expenditure he was incurring in advancing both sets of proceedings, when he was no doubt calculating that he would do better in the local courts than before the international arbitral tribunal to which he had agreed. It could also be said that, in the light of the objections made to the jurisdiction of the Togolese and Ivorian courts, Mr Tanoh was running the risk that his expenditure on the proceedings would turn out to be in vain (if the objections were upheld) anyway. At the same time, if Ecobank was going to bring a claim for an anti-enforcement injunction if it failed in Togo and Côte d'Ivoire, there was no good reason for it to delay seeking anti-suit relief in England, whose law governed the EEA and to whose jurisdiction the parties had submitted.
124 Nor do I think it right to say that the prejudice to Mr Tanoh arising from Ecobank's failure to seek relief before judgment is to be disregarded in the light of the fact that Ecobank was challenging jurisdiction. Whilst Mr Tanoh knew of Ecobank's objection, it was not apparent that Ecobank was ever going to seek injunctive relief until it did so (nor, as these proceedings indicate, was its entitlement to such relief self-evident) and the expenditure and effort which would have been wasted if an injunction was granted (and obeyed) increased as time went by. That is a relevant form of prejudice which continued even after the judgments were entered until 10 April 2015. During that time Ecobank commenced appeal proceedings and applied for provisional stays of execution
125 The judge was, therefore, right (para 22), in my view, not to accept that any time during which the foreign jurisdiction is challenged is to be left out of account when considering whether to grant an anti-enforcement order or that the Advent Capital plc case [2004] IL Pr 23 is to be taken as a decision to that effect. That case involved a claim to an anti-suit injunction. The Cypriot court had never given any judgment on the merits and does not appear to have been anywhere close to doing so. Morison J held, at para 44, in terms that there had been "no advancement of the substantive case" and therefore no prejudice to the insureds by granting the injunction. He was plainly concerned to consider whether the application for an injunction "had been sought promptly overall and before the foreign proceedings were too far advanced".
126Moreover the prejudice or detriment which would be involved in Ecobank allowing the proceedings to continue without seeking injunctive relief and then securing an injunction would not have been limited to Mr Tanoh. It extends to third parties involved

in the litigation and, most importantly, the foreign courts which, in the present case, have held hearings and produced judgments of considerable length which are obviously the product of much labour.

127 I agree with the judge (para 24) that it is not a precondition to the refusal of an injunction that the respondent should establish detrimental reliance, if by that is meant that he must show (a) that he believed that no application for an injunction would be made or (b) that he believed that and, if he had realised that an application would or might be made, he would have abandoned the foreign proceedings. The existence or otherwise of such reliance is relevant but not determinative. The relevance of delay is wider than that. The need to avoid it arises for a variety of reasons including the avoidance of prejudice, detriment, and waste of resources; the need for finality; and considerations of comity.

128 It is, thus, not, in my view, a complete answer for Ecobank to say that someone in the position of Mr Tanoh has only himself to blame because it his breach which will have caused the waste. The court is, in an appropriate case, entitled to be reluctant to use its coercive powers to restrain that which the applicant has in fact allowed to continue without any application for relief for some time. This is especially so if, as appears to me to be the case here, little useful purpose is likely to be served by the party who claims to be entitled to an injunction holding back from claiming it. In some cases, an objection to the jurisdiction can be dealt with first before the substantive merits, so that there may be something to be said for pursuing that objection in the foreign court. But that was not the case here.

129 Further the tenor of modern authorities is that an applicant should act promptly and claim injunctive relief at an early stage; and should not adopt an attitude of waiting to see what the foreign court decides. In The Angelic Grace [1995] 1 Lloyd's Rep 87 Leggatt LJ said that it would be patronising and the reverse of comity for the English court to decline to grant injunctive relief until it was apparent whether the foreign court was going to uphold the objection to its exercising jurisdiction and only do so if and when it failed to do so. Whilst those observations related to the approach of the court it seems to me that they are a guide to what should be the approach of a would-be applicant for anti-suit or anti-enforcement relief….

…132 Comity has a warm ring. It is important to analyse what it means. We are not here concerned with judicial amour propre but with the operation of systems of law. Courts around the free world endeavour to do justice between citizens in accordance with applicable laws as expeditiously as they can with the resources available to them. This is an exercise in the fulfilment of which judges ought to be comrades in arms. The burdens imposed on courts are well known: long lists, size of cases, shortages of judges, expanding waiting times, and competing demands on resources. The administration of justice and the interests of litigants and of courts is usually prejudiced by late attempts to change course or to terminate the voyage. If successful they often mean that time, effort, and expense, often considerable, will have been wasted both by the parties and the courts and others. Comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of such waste.

133 Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not per se a bar to an anti-suit injunction: see the AES case. But, as each stage is reached more will have been wasted by the

abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force." *(my emphasis)*

62. I have looked at the various cases to which I have been referred which consider the application of the above principles to the facts of particular cases, and I have also looked at the textbooks on the point, and in particular *Raphael on Anti-Suit Injunctions*, which sets out a helpful summary of those cases. However, in the final analysis, then each case turns on its own facts and the application of the above principles to those facts.

63. I have come to the conclusion that, even if, contrary to my earlier conclusion, there was here a binding EJC, then the Claimant's application for an ASI should be refused, as a matter of the exercise of my discretion. I bear in mind the following considerations in this regard:

    (1) The warrant of arrest was served on 28 February 2018. At this point, therefore, the clock started ticking for the purposes of applying for an ASI.

    (2) No application was however made at this point. Instead, the Claimant took the deliberate step of applying to set aside the warrant of arrest in Singapore, an application based in part on the existence of an arbitration clause, and invoked the jurisdiction of the Singapore Court to determine this question. It did not seek in the alternative to rely on the existence of the EJC.

    (3) In May 2018, the Claimant was itself the subject of proceedings based on the EJC brought by Gunvor. This reemphasised the potential argument based on the existence of the EJC. No application was made at this stage.

    (4) Instead, the Claimant chose to continue its challenge to jurisdiction, again based (in part) on the existence of an arbitration clause, and not an EJC.

    (5) That challenge led to two hearings, both at first instance and on appeal.

    (6) It was only shortly before the decision on appeal that this application for an ASI was brought.

64. In these circumstances, in my judgment, it cannot be said that the application has been brought promptly; nor can it be said that it has been brought before the foreign proceedings are too far advanced. Substantial time and costs have been expended in the Singapore proceedings. The Singapore courts have also given up substantial time and resources to this matter. Applying the approach laid down in the *Ecobank* case, as set out above, then in my judgment the Claimant has simply left it far too late to make its application here. Accordingly, if I had found that there was an EJC, I would still have refused to grant the ASI sought.

65. It only remains for me to thank both Counsel and their respective teams for their very helpful and illuminating arguments. I would ask that an appropriate order be drawn up in order to give effect to this judgment.