Neutral Citation Number: [2020] EWHC 3462 (Comm)

Case No: CL- 2020-000273

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 16/12/2020

Before :

Mr Justice Calver

- -

Between :

LAVENDER SHIPMANAGEMENT INC	**Claimant**
- and -	
(1) IBRAHIMA SORY AFFRETEMENT TRADING S.A.	
(2) LOUIS DREYFUS COMPANY SUISSE S.A.	
(3) AXA CORPORATE SOLUTIONS ASSURANCE S.A.	
(4) UNITED AMERICAN INSURANCE COMPANY	
(5) HDI GLOBAL SE	
(6) AIG EUROPE LIMITED	**Defendants**

- -
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Karen Maxwell (instructed by **Jackson Parton**) for the **Claimant**
Tom Nixon (instructed by **Roose & Partners**) for the **Defendants**

Hearing date: 27th November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 15 December 2020 at 2pm.

Mr Justice Calver :

1. This case raises issues concerning sections 67 and 69 of the Arbitration Act 1996. It first concerns the application of the Claimant (the "Owners") pursuant to section 67 of the Arbitration Act 1996 ("1996 Act") for an order setting aside a London arbitral tribunal's final award on jurisdiction dated 2 March 2020, by which it held that it had substantive jurisdiction to hear the parties' dispute (the "Award").

2. If that application is dismissed, then the Owners seek permission to appeal against the ruling on time bar contained in paragraph C of the Tribunal's Award pursuant to section 69 of the 1996 Act. They maintain that this ruling was on a question of law, is obviously wrong and that it is just and proper in all the circumstances for the court to determine the question.

Background Facts

3. I can take the background facts to the case from the helpful summary contained in the Award, and they are as follows.

4. In October 2017 the vessel *Majesty* carried a cargo of bagged rice from Yangon in Myanmar to Conakry in Guinea. The cargo was carried pursuant to a voyage charterparty and under five bills of lading. On arrival in Conakry, the cargo was alleged by the cargo Claimants to be short, damaged and wet, with torn bags and a small quantity allegedly lost overboard on the voyage.

5. The cargo Claimants (including initially the charterer of the vessel, the second Defendant in these proceedings) commenced arbitration proceedings in London against the Owners. They appointed Mark Hamsher as their arbitrator. The Owners appointed Jonathan Elvey as their arbitrator. When they found themselves unable to agree, the arbitrators appointed Christopher Moss as the third arbitrator. Prior to the appointment of Christopher Moss, the parties had expressly agreed that he should be a third arbitrator and not an umpire.

6. The Owners challenged the Tribunal's jurisdiction. The parties agreed that the Tribunal would make a ruling on its own jurisdiction as a preliminary issue. The Tribunal duly did so and found by a majority (with Mr. Elvey dissenting) that it did have jurisdiction.

The events after discharge

7. The vessel arrived at Conakry on 15 October 2017 and berthed on 29 October. A survey firm called JLB Expertises acting on behalf of the cargo Claimants arrived that day and monitored discharge in Conakry until it finished on 16 November. They inspected the cargo, the discharge operation and the sorting of the cargo thereafter. They recorded their findings in an undated survey report (although it appears it was issued at some point after 27 November 2017). They classified their findings by types of damage – shortage, torn bags, mouldy/caked cargo, and so on. They did *not* do so by bill of lading numbers or cargo quantities carried pursuant to each bill. Their assessment of the financial claims, by reference to loss and depreciation, was the global sum of USD$165,208.96. It is that figure which the cargo Claimants claimed in the arbitration.

8. The Owners also retained local surveyors to attend discharge at Conakry. Their report was issued on 15 January 2018. They also noted loss, shortage and damage. They too did *not* classify their findings by bill of lading numbers or cargo quantities.

The contracts of carriage and the LOU

The bills of lading

9. Five bills of lading were issued for the voyage between August and September 2017. The five bills of lading covered the total quantity of cargo carried by the *Majesty* – a cargo of 25,000mt of bagged long grain white rice, made up of 500,000 bags of 50kg each. Each bill of lading recorded the shipment of a different quantity of cargo. The bills of lading contained the conditions of carriage which included at clause (1) the following wording:

> "*All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, including the Law and arbitration clause are hereby incorporated*."

The Charterparty

10. The charterparty was a voyage charterparty on the Synacomex 90 Form with additions and amendments. It was dated 13 June 2017 and was made between the Owners and, as charterers, the Second Defendant. The clauses of the charterparty dealing with law and jurisdiction were clauses 17, 38, 43 and 69:

<u>Clause 17</u>: This is a printed clause in the Synacomex form referring disputes to arbitration in Paris. It has been deleted and replaced by the words "See Clauses 38 & 43".

<u>Clause 38</u> – BIMCO standard law and arbitration Clause 2009
BIMCO Standard Law and Arbitration Clause 2009 to apply – English Law, London arbitration.

<u>Clause 43</u> - arbitration
General Average/Arbitration in London and English Law to apply.

<u>Clause 69</u>
This contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this contract shall be referred to arbitration in London in accordance with the arbitration act 1996 or any statutory modification or re-enactment thereof ...

The arbitration shall be conducted in accordance with the London maritime arbitrators association (LMAA) terms current at the time when the arbitration proceedings are commenced. The reference shall be to two arbitrators.

A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice.

If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly.

The award of a sole arbitrator shall be binding on both parties as if he or she had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

If two arbitrators properly appointed by both arbitrators shall not agree they shall appoint an umpire whose decision shall be final.

In cases where neither the claim nor any counterclaim exceeds the sum of USD$100,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA small claims procedure current at the time when the arbitration proceedings are commenced.

11. Clause 69 is slightly different to the standard BIMCO clause referred to in Clause 38, but it was common ground between the parties before the Tribunal (and before this court) that Clause 69 was the applicable arbitration agreement that governed each bill of lading.

The Letter of Undertaking

12. Following discharge of the cargo, the parties discussed the provision of a letter of undertaking to the cargo Claimants to afford them security for their claims. A letter of undertaking was issued on 5 April 2018 ("the LOU"). It was issued by ETIC SAS ("ETIC"), on behalf of the Owner's Club, the London P&I Club (the "Club").

13. There were, in fact, two letters of undertaking issued with one superseding the other. The first, which is termed *Temporary Guarantee No 17-091*, was issued on 14 November 2017 during discharge operations ("the Temporary LOU"). This was before any claims had been formulated or advanced, and before the issue of the survey report, although necessarily after the cargo Claimants recognised that they had a claim against Owners. The second LOU, termed *Guarantee No 17-091*, was issued some 5 ½ months later on 5 April 2018. Its terms are materially identical to those of the Temporary LOU; only the sum secured has been amended from USD$365,270 down to USD$280,000. It follows that the parties always envisaged that the claims under the bills of lading, when aggregated, were likely to well exceed the small claims limit of USD$100,000. It is also apparent (see paragraphs 7 and 8 above) that from the outset, the loss was treated by the surveyors as the loss of one indivisible cargo of rice, rather than by individual bill of lading, hence the issuing of one LOU covering the entire cargo.

14. The LOU was addressed to the company which is now the first defendant in these proceedings, "*as receivers with title to sue and their subrogated underwriters*". It was not addressed to the second defendant-charterer, although it was stated to be:

> "*IN CONSIDERATION OF the Owners of and other parties entitled to sue in respect of the above mentioned claims concerning the cargo referred to above (hereinafter together referred to as the "cargo owners") refraining from taking action* …".

15. The heading of the LOU is important as it contains its subject matter. It reads as follows:

> "Vessel: M/V "MAJESTY"
>
> Port/date: Yangon/Conakry on 30/10/2017
>
> Cargo : 25,000 MT of bagged rice
>
> Bills of Lading: [all 5 bills of lading are listed by number]
>
> Nature of Claim: Alleged loss, shortage and/or damage to cargo."

16. The LOU then reads as follows:

> *"IN CONSIDERATION OF the Owners of and other parties entitled to sue in respect of the above-mentioned claims concerning the cargo referred to above (hereinafter together referred to as the "cargo owners") refraining from taking action resulting in the arrest, or otherwise detaining, or re-arresting at any time hereafter, the [Vessel] ... or obtaining security in respect of the above claim and of your refraining from commencing and/or prosecuting legal or arbitration proceedings in respect of the above claim (otherwise than before the Court or Tribunal referred to below) against the said vessel and/or against her shipowners Messrs Lavender Shipmanagement Inc, we, ETIC SAS, acting on behalf of The London P&I Club … hereby undertake to pay to you within 30 days of receipt by us of your first written demand such sums as may be agreed by way of amicable settlement or as payment be adjudged by a final and unappealable award or order of a properly constituted London Arbitration Tribunal, to be due to you in respect of the above cargo claim, provided that the total sum of our liability hereunder shall not in any circumstance exceed USD$280,000 … inclusive of interest and costs.*
>
> …

> *2. We undertake that we will accept on behalf of the Shipowners service of notice of appointment of Arbitrator made on behalf of the Cargo Owners.*
>
> *3. We confirm that the Shipowners agree that the above-mentioned claims shall be subject to English law and shall be brought in arbitration proceedings in London.*
>
> *4. We warrant that we have received irrevocable authority from the Shipowners to give this letter of undertaking in these terms.*
>
> *This undertaking shall be governed by and construed in accordance with English law and we agree to submit to the exclusive jurisdiction of the English High Court of Justice for the purpose of any process for the enforcement hereof.*
>
> *This Letter of Undertaking is not to be considered an admission of liability and is written entirely without prejudice to any rights, defences, immunities or limitations which the shipowners may have, none of which are regarded as waived.*
>
> *It is understood and agreed that the issuance of this letter by the signatory is not and shall not under any circumstances be construed as personally binding, nor binding upon [ETIC], but is binding only upon [The Club] at the above head office."*

The Extension of Time

17. Mindful no doubt that the Majesty had commenced discharge of her cargo at Conakry on 30 October 2017, an extension of time was sought towards the end of October 2018 by the cargo Claimants for the bringing of proceedings in respect of the damaged cargo. ETIC, acting on behalf of the Owners, agreed to two time extensions to the cargo Claimants (dated 23 October 2018 until 30 January 2019; and dated 14 January 2019 until 30 April 2019). The material terms of the first extension were that ETIC was:

> *"authorised by the Owners to agree an extension of time up to and including…30 January 2019 in favour of [the first Defendant/ first Claimant in the arbitration] and their subrogated underwriters for commencement of proceedings as per the above Bills of Lading in respect of the claim for alleged loss, shortage and/or damage to cargo in so far as they can be properly proceeded against.*
>
> *This extension is given without admission as to liability or admission of your client's title to sue and generally without prejudice to all Owners' rights and defences".*

18. The second extension is materially identical to the first, save that the date to which time is extended is of course different.

The Commencement of the Arbitration

19. The cargo Claimants commenced arbitration by a notice dated 29 April 2019 (the "Notice"). There is a dispute as to whether the Notice was effective to commence arbitration. After listing each of the Bills of Lading, the Notice reads as follows:

> *"Kindly note we have today appointed Mr Mark Hamsher as arbitrator on behalf of our clients, being the lawful holders of the above-captioned bills of lading and/or the owners of the cargo carried pursuant to [the Bills of Lading] together with their insurers [the Claimants are listed]*
>
> *Mr Hamsher's appointment has been made in respect of claims arising in respect of shortage and/or non delivery [etc] pursuant to the contract of carriage contained in or evidenced by each of the above-captioned bills of lading and has been made pursuant to the terms of an ad hoc arbitration agreement contained in the letter of undertaking dated 5 April 2018 issued on behalf of The London Steam-Ship Owners' Mutual Insurance Association Limited (the "LOU").*
>
> *Alternatively, Mr Hamsher's appointment has been made in respect of claims arising in respect of shortage [etc] to the cargo carried pursuant to the contract of carriage contained in or evidenced by [the Bills of Lading] and has been made pursuant to clause 38 of a charterparty dated 13 June 2017 the terms of which are expressly incorporated into the contract of carriage contained in or evidenced by [the Bills of Lading].*
>
> *Mr Hamsher's appointment is in respect of all and any claims our clients have against you arising pursuant to the contract of carriage contained in or evidenced by [the Bills of Lading] [etc]*
>
> *[Address and information]*
>
> *Our clients are agreeable to Mr Hamsher acting as a sole arbitrator and, therefore, we call upon you to agree his appointment as sole arbitrator, failing which we hereby call upon you to appoint your own arbitrator within 14 days of today's date.*
>
> *To the extent that the LMAA Small Claims Procedure applies to our clients' claims, please confirm within 14 days that Mr Hamsher is agreed as sole arbitrator. This is without prejudice to our position that the Small Claims Procedure does not apply as there is no reference to it in the LOU.*

> *For the avoidance of doubt, this notice is intended to commence arbitration proceedings in respect of disputes arising pursuant to the contracts of carriage contained in or evidenced by each of [the Bills of Lading]."*

20. As will be apparent, the Notice is drafted broadly, with a view to covering different eventualities and arguments. First, the agreement is made "*pursuant to the terms of an ad hoc arbitration agreement contained in the letter of undertaking"*. Alternatively, it is made "*pursuant to clause 38 of a charterparty"*. Finally, the cargo Claimants were "*agreeable to Mr Hamsher acting as a sole arbitrator"* to the extent that the Small Claims Procedure (SCP) applied (which however was denied). In this way, Mr Nixon for the cargo Claimants suggests that the Notice operates in a "waterfall" through various possible constructions that might apply to the parties dispute resolution agreements. In all instances, it confirmed that Mr Hamsher had already been appointed to act on behalf of the cargo Claimants.

The appointment of Jonathan Elvey

21. In responding to the Notice, Jonathan Elvey was appointed as the Owners' arbitrator by an email sent by Hewett & Co (for the Owners) to Roose & Partners (for the cargo Claimants) on 6 May 2019. It said that Mr Elvey had accepted his appointment as Owners' arbitrator on current LMAA terms. It continued:

> *"However we must emphasise that the appointment of Mr Elvey is made solely to respond to the appointment of Mr Hamsher on your clients' behalf and is made under protest of jurisdiction, on the basis that there is no ad hoc Arbitration Agreement in the Club LOU and ii. the claims that you seek to pursue on behalf of your named clients fall within the LMAA Small Claims Procedure ... which, as you clearly know, calls for the appointment of a sole arbitrator.*
>
> *…*
>
> *Insofar as you invite our clients' agreement to the appointment of Mr Hamsher as sole arbitrator under the SCP, this invitation is declined. It would be quite inappropriate for an arbitrator already appointed on behalf of your clients, as you say Mr Hamsher has been, to be proposed as a sole arbitrator in relation to arbitrations under the SCP. We must also record that we do not accept that your invitation validly commences any arbitration under the SCP.*
>
> *…*
>
> *... we await your confirmation that your clients accept that, contractually, any disputes fall within the SCP, by way of 5 separate arbitration references, to reflect the fact that each B/L contains a separate Arbitration Agreement."*

22. The cargo Claimants refused to give that confirmation.

The Award

23. The Tribunal considered the jurisdictional issues. The majority of the Tribunal (with Mr Elvey dissenting) found that:

    a. Whilst 5 bills of lading each contained a separate arbitration clause governed in part by the LMAA SCP, by the terms of the LOU the parties thereby agreed to consolidate those arbitrations and to have them heard in a single *ad hoc* arbitration.

    b. The time extensions operated to grant the cargo Claimants an extension in respect of commencing arbitration proceedings pursuant to the *ad hoc* arbitration agreement in the LOU.

24. The finding in point (a) is the subject of the s67 challenge. The finding in point (b) is the subject matter of the section 69 challenge, posing the following question:
    Assuming that the parties agreed to resolve their disputes by a separate arbitration clause in the LOU, was the extension of time solely granted in respect of disputes to be under the arbitration clauses in the Bills themselves.

I shall take each of the two issues in turn, starting with the section 67 challenge.

The s. 67 Application: The Arbitration Agreement

25. Section 67 gives the Court the power to set aside or vary an award where the tribunal does not have "substantive jurisdiction". Section 30 of the 1996 Act defines "substantive jurisdiction" as:
    a. Whether there is a valid arbitration agreement;

    b. Whether the tribunal is properly constituted, and

    c. What matters have been submitted to arbitration in accordance with the arbitration agreement.

26. Under s. 67, it is for this court to consider jurisdiction afresh and not simply to review the arbitral tribunal's decision. As it was put in *GPF GP SARL v Republic of Poland* [2018] Bus. L.R. 1203 at [70] by Bryan J:

    > *"I am satisfied that on the current state of the authorities (including not only a wealth of first instance decisions but also dicta at appellate level, including in Dallah) a hearing under section 67 is a re-hearing, and that is so whether the case involves a question of jurisdiction ratione personae or ratione materiae (for a recent example of the latter see the judgment of Carr J in C v D [2015] EWHC 2126 (Comm)). In each case, where it is said the tribunal has no jurisdiction, it is on the basis that either there is no arbitration agreement between the particular parties, or that there is no arbitration agreement that confers jurisdiction in respect of the claim made. In each case if the submission is proved, the Tribunal has no jurisdiction as no jurisdiction has been conferred upon it by the parties in an*

> *arbitration agreement. In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators. Ultimately jurisdiction either is, or is not, conferred on the true construction of the arbitration agreement, and that ought not to be fettered by how arguments were advanced below, subject always to the discretion of the court as to the admission of evidence before it. Indeed, experience shows that the arguments on challenge can be, and are, often presented in fresh and different ways (see the observations of Carr J in C v D, supra at [72])."*

27. In answer to the section 67 application, the cargo Claimants submit that "*by the LOU…the parties agreed to an ad hoc arbitration which consolidated claims under all five bills and replaced the arbitration clauses incorporated therein*". Alternatively, the LOU consolidated the claims arising under the Bills, but clause 69 Charterparty Terms would otherwise govern the new global dispute. In the further alternative, the LOU consolidated the claims under an *ad hoc* London arbitration, without specifying the number of arbitrators, leading to it being governed by s 15(3) of the 1996 Act (i.e. jointly appointed sole arbitrator). They add that what the LOU certainly did not do is incorporate the SCP and require it to be applied to the newly consolidated dispute that exceeded USD$100,000.

28. In contrast Ms Maxwell, for the Owners, submits that:

    a. There was no arbitration agreement providing for a three-man tribunal or for a consolidated reference. In particular, the LOU contained no such arbitration agreement; and/or

    b. The tribunal was not properly constituted; and/or

    c. The Notice was ineffective to submit the claims to arbitration in accordance with the arbitration agreement or agreements.

The Quest

29. In determining the jurisdictional questions, both parties invite me to consider the decision in *Viscous Global Investment Ltd v Palladium Navigation Corp (The "Quest")* [2014] EWHC 2654 (Comm). In that case, a cargo of bagged rice was carried from Thailand to Nigeria pursuant to four bills of lading. The claimant cargo interests said that the cargo was discharged in a damaged condition and referred the dispute to arbitration. There was a dispute as to which arbitration clause applied. The bills of lading incorporated an arbitration clause of the "*Charterparty dated as overleaf*" but none of the bills identified a charterparty on its face. There were three possible charterparties each of which contained an arbitration clause. The Club issued an LOU providing security which stated that:

> *"1. We confirm that the Ship Owners agree that the above mentioned claims shall be subject to London Arbitration (under the law auspices of the LMAA) and English Law to apply (Hague-Visby Rules and COGSA 1992), and for each party to nominate its own arbitrator and the two so appointed may appoint a third."*

30. The claimant brought an application under section 32 of the Arbitration Act 1996, contending that the LOU arbitration clause replaced the existing arbitration clauses. The defendant submitted that unless a variation was *"fundamentally inconsistent"* with an existing clause, it was to be construed as having only limited effect. Males J rejected such an argument. The question was purely one of construction:

> *"18. Plainly, and as is common ground, clause 1 of the LOU contains a binding agreement between the parties which at the least varied the parties' pre-existing agreement to arbitrate contained in whichever of the charterparty arbitration clauses was incorporated into the bills of lading. The question whether the parties intended the LOU to replace the existing agreements in their entirety or merely to vary them in limited respects while leaving the existing agreements otherwise in force is one of construction of the LOU in its context, applying ordinary principles of construction in the light of business common sense. The context includes the pre-existing contractual position. There is no reason in principle why the terms of an LOU should not operate as a complete replacement of an existing dispute resolution clause. An example of such a case is The Pia Vesta [1984] 1 Lloyd's Rep 169, where Sheen J described an agreement in an LOU to submit to English jurisdiction as a variation (by which he meant a complete substitution) of an existing bill of lading clause providing for Danish jurisdiction.*
>
> *19. I do not accept that there is any principle of construction that unless a variation is "fundamentally inconsistent" with, or "goes to the root of", an existing clause, it will be construed as having only limited effect. The cases on which Mr Kulkarni relied for that proposition (principally Morris v Baron & Co [1917] AC 1 and British & Beningtons Ltd v North Western Cachar Tea Co Ltd [1923] AC 48) were focussed on a very different problem, namely the rule that an oral agreement was not effective to vary a contract which was required to be in writing – a rule which, it was held, did not apply if the oral agreement was so fundamentally inconsistent with the written contract as to show an intention to rescind or extinguish the existing contract and start again. There is no need in the present context to introduce the kind of intellectual contortions to which that rule could lead and it would be a retrograde step to do so. Rather the principle is simply one of construction – looking at the matter objectively and in the light of the relevant background, what meaning would the contract convey to a reasonable person?"*

31. Applying this approach, he found as follows:

    a. First, the "*LOU is perfectly capable of operating as a new and free standing agreement, containing everything that is needed in such a clause"* and accordingly there was no reason why "*the parties should not have intended the LOU to replace the charterparty arbitration clauses in their entirety"* [22]-[23];

    b. Second, "*it is not readily apparent why the parties should have intended their arbitration agreement to be located in two places, partly in the LOU and partly in the head charter arbitration clause."* [24]

    c. Third, the overall sum was modest, and the claims were likely to raise much the same issues. "*It is therefore striking, if they intended it to apply, that there is no mention of the Small Claims Procedure in the LOU."* [25]

    d. Fourth, *"it would make no sense at all to my mind for the parties to agree in such circumstances for four separate arbitrations, some conducted under the Small Claims Procedure by a sole arbitrator and some under the "ordinary" LMAA procedure by a three man tribunal. But that is the inevitable consequence of the approach for which the owners contend"* [26]

    e. Fifth, *"I have so far assumed that the clause incorporated in the bills of lading was the head charter arbitration clause. That may well be right. But there was at least scope for disagreement as to which of the charterparty arbitration clauses would apply, the head charter with its provision for London arbitration or the voyage charter which provided for arbitration in Singapore.'* The LOU removed '*any possibility of disagreement"* [27]-[28].

32. Males J therefore concluded:

    > *"29. These considerations provide, as I have said, compelling reasons why the parties should have intended – and in my judgment they did intend – that the LOU should replace entirely the charterparty arbitration clauses. There is nothing of any weight to put in the scales on the other side. In particular, I do not accept that it is of any significance to say that the primary purpose of the LOU was to provide security. Perhaps it was, but the purpose of a contract is generally to be derived primarily from its terms, and it was at least one purpose of this LOU to make provision for the way in which the parties' dispute was to be arbitrated."*

33. In *The Ocean Neptune* [2018] 1 Lloyd's Rep. 654, Popplewell J (as he then was) helpfully summarised the relevant principles of construction on a section 69 challenge as follows:

    > *"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all*

> *the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."*

Owners' Submissions on s. 67

34. In her skilful and persuasive submissions, Ms Maxwell for the Owners suggested that for the cargo Claimants to succeed, they needed to show that the LOU: 1) is an *ad hoc* agreement to arbitrate; 2) consolidates into one claim, in one arbitration, each of the claims under each of the bills of lading. Ms Maxwell submits that, as a matter of construction, it does neither.

35. First, she says, there are significant benefits afforded by the SCP that the Owners would not, without good reason, have given up. The SCP provides a default procedure for the appointment of a single arbitrator at fixed fee of £4,000; a quick and efficient procedure in terms of disclosure, hearings and the issuance of an award; a ceiling on legal costs; and an exclusion of a right of appeal.

36. Second, Ms Maxwell stresses the timing of the issuance of the two LOUs. The wording of the Permanent LOU is the same as that of the Temporary LOU (save as to the total amount of the cargo claim) and, accordingly, the Permanent LOU is to be construed in light of the fact that when the Temporary LOU was issued no claim had yet been formulated by the cargo Claimants.

37. Third, Ms Maxwell makes a number of points on the wording of the LOU:

    a. *First*, it was not addressed to the second defendant. Had it been intended to replace the dispute resolution clause contained in clause 69, it would have

addressed the party who, at that stage, might have been the lawful holder of the bill of lading.

b. *Second*, the heading refers to refraining from issuing a claim "*otherwise than before the Court or Tribunal referred to below"*. Why, if the LOU was itself a freestanding arbitration agreement, would it refer to *Court* proceedings as well? The reference to Court, it is therefore submitted, is to be taken as an indication that the LOU was not intended to create any new legal rights.

c. *Third*, it is said that a "*properly constituted London Arbitration Tribunal"* is entirely meaningless unless properly understood as a reference to an extraneous agreement, here clause 69, which contained the *actual* arbitration agreement.

d. *Fourth*, in paragraph 2 of the LOU the Club undertakes to accept notice of appointment of an Arbitrator on behalf of the cargo Claimants. This, it is submitted, is most naturally read as a reference to a willingness to accept an appointment (if necessary) under clause 69.

e. *Fifth*, the LOU is "*not understood under any circumstances to be construed as personally binding, nor binding upon ETIC, but is binding only upon* [the] *Club"*. While it is accepted that language refers primarily to ETIC (an agent acting on behalf of the Owners and the Club), it is not the language that would have been used if the LOU had been intended to also bind the Owners.

f. *Sixth*, the language used in the operative provision of the LOU (clause 3) is "*We confirm"* that proceedings will be subject to English law and shall be brought in arbitration proceedings in London. In contrast to this, the other paragraphs use the language of "*warrant"* or "*undertake"*. Had it been intended to create new rights, that would have been the language the Club would have used.

g. *Seventh*, the LOU is expressly "*without prejudice to any rights, defences, immunities or limitations, which the shipowners may have, none of which are regarded as waived"*. That extends to the right to have a claim of less than US$100,000 arbitrated under the SCP.

38. These submissions are consistent with the dissenting opinion of Mr Elvey. He concluded as follows:

a. *First,* the heading of the LOU refers to the bills of lading and then to the potential claims (for loss, shortage and damage to cargo). He recognised that there is no wording referring explicitly to claims under the bills of lading but in his view "*the combination of the two provisions has this effect. I also consider this is how it would have been understood at the time…"*

b. *Second,* the LOU does not contain the necessary means for an identifiable or workable arbitration procedure. It does not provide for the constitution of a valid tribunal. It contains no provision or guidance for the potential Respondent as to how, when and who it can appoint or agree as its arbitrator. There is no guidance as to what makes a tribunal "*properly constituted"*. Indeed, taken in isolation, the LOU appears to be contradictory. The reference to arbitration proceedings in London governed by English law might imply that the default procedure

under *s.15(3)* of the 1996 Act should apply and a sole arbitrator appointed. Yet there is also a reference to accepting notice of appointment of an arbitrator. That is difficult to square when the LOU is taken in isolation.

c. *Third,* that the LOU "*confirms"* an arbitration agreement is indicative that the LOU was referring back to a pre-existing agreement to arbitrate – here the provisions already agreed in Clause 69.

39. Ms Maxwell also submitted that this case was distinguishable from *The Quest.* First, the language of the LOU in that case was substantially more specific. The undertaking in *The Quest* referred only to proceedings before the tribunal and not to a court. The LOU was also a "comprehensive" arbitration agreement, containing comprehensive provisions relating to applicable law, appointment procedures, and arbitral procedures which are lacking in the instant case. Second, part of the *"pre-existing contractual position"* was the underlying difficulty in identifying the governing arbitration clause. Any disagreement was removed by the terms of the LOU. Here, Ms Maxwell submits, the opposite is true: why would the parties replace the detailed provisions of clause 69 with a free-standing *ad hoc* agreement with no specified procedure?

40. Even if that were wrong, Ms Maxwell submits, there is still no agreement to have the claims heard in a consolidated procedure. No conclusion can be drawn from the use of the singular "*claim"* in the LOU. First, the singular ("claim") and the plural ("claims") are used inconsistently throughout the document. Second, she relies upon the decision of Hamblen J in *Easybiz Investments v Sinograin* (The "Biz") [2010] EWHC 2565 (Comm); [2011] 1 Lloyd's Rep 687. In that case, a party purported to commence an arbitration under 10 bills of lading by a single notice. There was no currency in an argument that there was a singular notice, or that "reference" was used in the singular, or that there was a reference to 'an' arbitrator. The notice was effective in commencing arbitration under each of the bills of lading [15]-[19]. Ms Maxwell says this approach to the arbitration notice is equally applicable to the arbitration agreement.

41. Finally, Ms Maxwell says that this situation was a mess of the cargo Claimants' own making. They could have instructed their surveyor to provide evidence of the particular loss under each particular bill of lading but they chose not to do so. They have operated inconsistently throughout as to the basis of the arbitration agreement. Mr Hamsher appears to have accepted the appointment *"in respect of all disputes arising under the above bills of lading"*. The cargo Claimants then issued a *section 17* notice to appoint Mr Hamsher as sole arbitrator, but which they subsequently withdrew. Their claim submissions did not refer to the LOU, nor was the LOU exhibited to them.

Cargo Claimants' Submissions

42. In contrast, Mr Nixon for the cargo Claimants submitted that the disposal of this claim is entirely straightforward. He relied on three alternative constructions of the LOU as follows.

a. His *primary* argument was that the LOU consolidated the arbitrations under the 5 bills of lading and created a new freestanding agreement, by way of an *ad hoc* London arbitration agreement, but by agreement permitted each party to appoint their own arbitrator (Construction 1).

b. *Alternatively*, he submits that the LOU consolidated the claims arising under the Bills, but intended to retain LMAA terms as set out in the Charterparty (Construction 2).

c. In the *further alternative* he submits that the LOU consolidated the claims before an *ad hoc* tribunal of a jointly appointed sole arbitrator (pursuant to s15(3) of the 1996 Act) (Construction 3**).**

43. Taking a business common-sense construction to the LOU, the Club will not, he submits, be interested in the jurisdictional complexities that might arise under multiple arbitrations. The purpose of the LOU is to set out clearly the forum in which they are willing to allow their principal, the Owners, to be sued. Second, the cargo surveys undertaken treat the bills of lading interchangeably. There was one cargo. All the bags of rice carried the same markings and were of the same size and weight. There is no suggestion that the factual basis of each claim concerning the damaged/lost cargo of rice would be any different under any of the bills of lading and there was no evidence that the Owners would have a defence under one of the bills of lading and not under the other.

44. Mr. Nixon submits that this case is similar to *The Quest.* As the court considered in that case, a finding that the parties intended their disputes to be arbitrated under a single LOU was supported by "*the language of the LOU and made better business sense*" [30]. Whilst the LOU in that case contained more detail (as to procedure etc), the question is ultimately one of construction. The language of the LOU, read in its commercial context, clearly intends to provide a new arbitration agreement that consolidates all of the disputes under the 5 bills of lading, which concern damage to one cargo of rice.

Discussion

45. As Males J stated in *The Quest*, the question which has to be determined in this case is simply one of construction, namely: looking at the matter objectively and in the light of the relevant background, what meaning would the contract convey to a reasonable person. The relevant background here includes:

    (1) Clause 69 of the Charterparty;

    (2) The fact that the surveyors did not classify their findings as to the damage to and loss of the cargo by bill of lading numbers or cargo quantities;

    (3) The parties chose to issue one LOU covering the entire cargo. The sum secured under the LOU is USD$280,000, with the parties aggregating all claims under the 5 bills of lading, at least so far as the security was concerned.

46. As a matter of objective construction against the relevant factual background, I consider that the meaning that the LOU would convey to a reasonable person, applying business common sense to it, is that it is an agreement to consolidate all of the claims (of loss, shortage and/or damage) in respect of the entire cargo of 25,000MT of bagged

rice before a London arbitration tribunal constituted in accordance with clause 69 of the Charterparty. I find that to be so for the following reasons.

(1) The LOU is somewhat informally drafted. But it is necessary, in my judgment, to give effect to the elements of the wider context in determining the objective meaning of the language used, and to prefer the construction which is consistent with business common sense and to reject the other;

(2) It is clear from the opening words of the LOU that it is intended to apply to anyone who is entitled to sue in respect of the loss of/shortage to/damage to the cargo;

(3) The LOU is stated to cover "*the above claim*" (singular) and the "*the above cargo claim*" (singular) not exceeding USD$280,000. The nature of the above cargo claim is described in the subject heading as consisting of "*alleged loss, shortage and/or damage to cargo*", the cargo being defined compendiously as "*25,000 MT of bagged rice*". Whilst it is fair to say that clause 3 of the LOU refers to the "*above-mentioned claims*", it is tolerably clear from the other references to "claim" and, importantly, to the way in which "claim" is defined in the subject heading that the parties are referring to one combined claim in respect of the lost/damaged/short cargo;

(4) The cargo owners (as defined) agree not to commence or prosecute legal or arbitration proceedings in respect of "*the above claim*" (singular) "*otherwise than before the Court or Tribunal referred to below*". The Owners then undertake to pay the cargo owners such sums as may be adjudged by a final and unappealable award or order (singular) "*of a properly constituted London Arbitral Tribunal*" to be due to the cargo owners in respect of the above cargo claim;

(5) The parties must be taken to have had in mind the means by which the "*London Arbitral Tribunal*" was to be "*properly constituted*". I do not consider this phrase, read in its contractual context, to be meaningless; rather I consider it to be a reference back to the London Arbitral Tribunal referred to in clause 69 of the Charterparty, which clause explains how the tribunal is to be constituted. Indeed, clause 69 provides for the appointment by each party of their own arbitrator and then the appointment of an umpire if the two arbitrators cannot agree. Clause 2 of the LOU makes sense against this contractual background, in that the P&I Club undertakes to accept on behalf of the Owners the service of notice of appointment of arbitrator made on behalf of the Cargo Owners, which is consistent with the 3rd unnumbered clause of clause 69. There is indeed, therefore, a workable arbitral procedure which is laid out in clause 69;

(6) This construction is also consistent with clause 3 of the LOU, because the Owners have already agreed by clause 69 that English law applies and that there shall be arbitration in London, and therefore the P&I Club is merely "confirming" that the Owners agree to this. This is, therefore, not so much an intention to create new rights as confirming the rights which already exist in clause 69;

(7) The P&I Club then confirms that it has irrevocable authority from the Owners to give the LOU and agrees that the LOU itself is to be governed and construed in accordance with English law and subject to the exclusive jurisdiction of the English

High Court (hence the reference to "*the Court or Tribunal referred to below*" on the first page of the LOU before the numbered paragraphs which follow). I consider that the clear intention is to bind the Owners to the LOU;

(8) The reference to the LOU not being considered "*an admission of liability and ... written entirely without prejudice to any rights, defences, immunities or limitations which the shipowners may have, none of which are regarded as waived*" must be read as a qualification in relation to the combined cargo claim, such that the SCP is of no relevance. In other words, in respect of the claim which forms the subject matter of the LOU, Owners have no right to invoke the SCP. Of course, the Owners retain their substantive rights to advance separate defences to each of the bills of lading in the (unlikely) event that they wish to do so;

(9) There is, of course, considerable commercial sense to this construction of the LOU, as it meant that the issues with one shipment of 25,000 MT of bagged rice could be resolved once and for all in one arbitration, avoiding the inconvenience of having to commence 5 separate arbitrations and the risk of inconsistent awards. This affords a sound commercial reason as to why Owners would give up an entitlement to utilise the SCP.

47. It follows that whilst the LOU is to be constructed in the light of clause 69, the last provision of clause 69 is simply of no application to the facts of this case. That is because this is not a case where the claim is below the threshold of USD$100,000. The claim which forms the subject matter of the LOU exceeds that sum and so the properly constituted London Arbitration Tribunal in the case of this cargo claim is not one constituted in accordance with the LMAA small claims procedure.

48. The only remaining puzzle so far as the LOU is concerned is that, as Ms Maxwell pointed out, it is not specifically addressed to the second defendant-charterer. If the parties at that time considered that the charterer might have had a claim, it is surprising that that is so. Ms Maxwell argues that it would have made obvious commercial sense to include the charterer in an overriding arbitration agreement to avoid the risk of inconsistent arbitration awards. That stated, it is clear that the parties objectively intended the LOU to apply to <u>any</u> party "*entitled to sue in respect of the above mentioned claims concerning the cargo*" and that the arbitration was intended to bind all interested parties. Moreover, it may also have been apparent when the first, Temporary LOU was issued on 14 November 2017 that the claims in respect of the cargo belonged to the cargo Claimants as the holders of the bills of lading (the ship had berthed on 29 October and it began discharging its cargo on that day with the cargo owners' surveyor in attendance). The factual position is unclear. But looked at objectively, I do not consider that this point detracts from the business common-sense conclusion that by the LOU the parties were seeking to resolve the claims of any party entitled to sue in respect of the damaged/lost cargo before one tribunal by way of a consolidated claim.

49. In the circumstances I dismiss this aspect of the section 67 application.

Section 67 Application: The Notice of Arbitration

50. Mr Nixon submits that in determining whether the notice of arbitration ("the Notice") is a valid notice, the court should take a broad, flexible and non-technical approach. In *Nea Agrex SA v Baltic Shipping Co Ltd (The Agios Lazaros)* [1976] 2 Lloyd's Rep 47, the Court of Appeal held that a notice simply stating "*Please advise your proposal in order to settle this matter or name your arbitrators*" was sufficient, and Lord Denning MR held that: *"I require the difference between us to be submitted to arbitration*" would suffice. Goff LJ held that the notice would be valid even if the party positively got the manner of commencement wrong:

> *"The section I think clearly envisages that a party who wishes to commence arbitration will, when there are to be arbitrators on both sides, call upon his opponent "to appoint an arbitrator", and when the reference is to a single arbitrator will call upon him "to agree to the appointment of an arbitrator". However, if he adopts the wrong course, that would not in my judgment make his requisition a nullity, or prevent arbitration commencing. It would be no more than an irregularity capable of being remedied."*

51. Mr Nixon also draws my attention to *The Eleni P* [2015] 1 Lloyd's Rep 461 to demonstrate the breadth of this principle. There, following a hijacking dispute, both parties appeared to commence an arbitration by appointing their own arbitrators. Teare J considered that the "*objective and sensible analysis"* was that the second appointment was in the first arbitration despite a linguistic analysis supporting a reading that the notice had commenced a fresh arbitration, see [34]-[36], especially at [35]:

> *"This approach to Deiulemar's appointment of Mr. Farrington is supported by the approach of the courts when considering the form of words necessary for the commencement of arbitration. In The Agios Lazaros [1976] 2 Lloyd's Rep.47 Goff LJ said that the adoption of the wrong form of words would not make the communication a nullity. It would be no more than an irregularity capable of being remedied. Shaw LJ said that the form and words of a communication commencing arbitration do not call for an excessively strict scrutiny. Regard should be had to the substance. This decision was closely analysed by Rix J. in The Smaro* [1999] 1 Lloyd's Rep 225 *at pp.231-233. Rix J. concluded that the ultimate lesson to be learned was that the wording of a notice commencing arbitration need not be regarded strictly or formulaically. It was sufficient to have regard to its substance. I consider that the same approach should be applied when considering whether Deiulemar's appointment of Mr. Farrington on 26 January 2012 was in substance an appointment of its arbitrator in the arbitration commenced by Transgrain. I consider that it was and that it is not to be regarded as ineffective in that regard simply because, as a matter of form, the appointment was purporting to*

> *commence an arbitration rather than respond to an arbitration already commenced by Transgrain; cf The Petr Schmidt [1995] 1 Lloyd's Rep.202 at p.207."*

52. I did not understand Ms Maxwell to dispute any of this and she accepted that the approach taken was generally a robust one. What is necessary, she said, is that the notifying party invoked the arbitration agreement. Indeed, in *The Agios Lazaros* [1976] 2 LLR 47 at 58, Shaw LJ, in asking the question as to when an arbitration is "brought", considered that by analogy to s. 27 of the Limitation Act 1939 that:

> *"If a general principle is to be extracted from s. 27(2) it seems to me that where a dispute arises which is within the scope of a pre-existing agreement to submit disputes to arbitration, then an arbitration is commenced when one party gives notice to the other party intimating that he proposes to invoke the arbitration agreement and requiring that other party to take some step towards setting an arbitration in train."*

53. Ms Maxwell submitted that the Notice reads more like an invitation to begin a dialogue on the appropriate dispute resolution forum rather than an invocation of an arbitration agreement. I asked Ms Maxwell whether, if the Owners are wrong on the proper construction of the LOU, which I have found that to be the case, she still maintained that the Notice was invalid. She submitted that even if the LOU was construed as a freestanding agreement to arbitrate, then the Notice would still be invalid because you cannot have a waterfall provision in which several alternative arbitration agreements are invoked.

54. Whilst it is not particularly felicitously worded and seeks to keep all possible bases of appointment open, the Notice does nonetheless purport to appoint Mr. Hamsher as arbitrator under the terms of the LOU as the *primary* case, and expressly states that the SCP does not apply to the claims thereunder. Against the background of the proper construction of the LOU, I consider the Notice, on an objective and sensible analysis, to be a valid Notice, submitting all of the claims in respect of the cargo to the consolidated procedure under the LOU.

55. It follows that the section 67 challenge to the validity of the Notice also fails.

Section 69 Challenge

56. The Section 69 application concerns the proper construction of the exchange of letters concerning an extension of time to commence arbitration. I have set out the material terms above.

57. The Tribunal held that the time extension applied to the LOU on the basis that the extension was granted by the same party who had agreed the terms of the LOU and that on a "purposive" construction, it must have been intended it to cover that same arbitration. The Owners submit that this is wrong. The LOU was issued by the vessel's Club. The extension was agreed by the Owners. The fact that ETIC acted as agent for both the Owners and the Club is neither here nor there. They say that the extension refers to proceedings "*as per the above Bills of Lading"* and had it been intended to

apply to the LOU, it would have said so. Beyond that, there is no room for a purposive approach to apply.

58. That, though, appears to be a misreading of both the LOU and the 23 October 2018 letter. Neither were issued directly by the Owners but both recorded that the issuers, the Club and ETIC, were authorised by the Owners. Accordingly it is clear that both the arbitration agreement and the extension of time were agreed to by the Owners. It is irrelevant which of the Owner or its affiliates communicated this to the cargo Claimants. In its context, the extension of time would have been objectively (and indeed subjectively) understood to relate to the LOU. Having just agreed the LOU, any extension of time would be expected to apply to *that* arbitration agreement.

59. I therefore agree with Mr. Nixon for the cargo Claimants that the reference to proceedings "*as per the above Bills of Lading*" ought properly and sensibly be read to apply to disputes arising under the Bills of Lading, which had been agreed to be resolved in a consolidated arbitration under the LOU. There is no reason why the parties would want to agree to a time extension of the kind suggested by the Owners where, by the time they agreed the extensions, they had agreed to consolidate the dispute into a single reference.

60. I do not consider that there is anything unorthodox about this approach to construction. Regardless of the label attached to it by the Tribunal, it is clear that they applied the ordinary principles of construction by asking how the letters extending time would be viewed objectively in their commercial context. In my judgment, they came to the correct conclusion.

61. Accordingly, I am satisfied that the Tribunal's decision on the extension of time was correct and accordingly, cannot be said to be "*obviously wrong*" so as to justify permission to appeal under section 69. I therefore refuse permission to appeal on this point.

Conclusion

62. In the circumstances I dismiss both of the Claimant's applications.