IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 20

Originating Summons No 83 of 2018; Summons No 729 of 2018; Summons No 987 of 2018

Between

Hai Jiang 1401 Pte. Ltd.

… *Plaintiff*

And

Singapore Technologies Marine Ltd.

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — [Anti-Suit Injunction]

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v
Singapore Technologies Marine Ltd.

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High Court — Originating Summons No 83 of 2018
Quentin Loh J
30 January, 12 February, 25 April, 7–8 August, 15 November 2018; 25 October 2019

24 January 2020

Quentin Loh J:

1 This judgement was given on 25 October 2019 as an oral judgement after hearing full arguments from the parties at the *inter partes* stage of an application for an anti-suit injunction to restrain the Defendant from continuing with its proceedings in Sharjah, United Arab Emirates, against the vessel MV "SEVEN CHAMPION" (formerly MV "LEWEK CHAMPION") ("the Vessel"), the Plaintiff owner of the Vessel and the bareboat charterer Lewek Champion Shipping Pte Ltd ("LCS"). I have been asked by counsel to consider issuing a written judgement, (which I now do), as this is the first case in Singapore to adopt what has come to be known as the *Sea Premium* line of cases, emanating from Steel J's decision in *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd* [2001] EWHC 540 (Admlty) ("*The Sea Premium*"). Save for editorial changes, my oral judgement handed down on 25 October 2019 comprised [2] to [85] herein.

Facts

2 Through a sale and lease back arrangement, the Plaintiff, as purchaser and owner of the Vessel, bareboat chartered ("BCP") the Vessel to LCS. The BCP, dated 19 February 2014, was for a period of 120 months, at a daily rate of US$56,500 per day and LCS took delivery of the Vessel on 26 February 2014. Under the BCP, LCS undertook to the Plaintiff (as owner) to, *inter alia*, remove the existing crane on the Vessel, strengthen the Vessel's structure and install a new higher capacity crane. Under the BCP, LCS had the option to purchase the Vessel. LCS sub-bareboat chartered ("SBCP") the Vessel to EMAS-AMC Pte Ltd ("EMAC"), a company within the same group, the Ezra group of companies, on a back-to-back basis. EMAC gave identical undertakings to LCS in the SBCP as LCS had given to the Plaintiff in the BCP. The SBCP was signed on 17 February 2014 and the charter hire was US$63,000 per day. The SBCP defined the Plaintiff as the "Ultimate Owner".

3 The Plaintiff, LCS and EMAC entered into a General Assignment ("GA") dated 26 February 2014 under which LCS assigned its various rights and interests to the Plaintiff:

> **3.1 General.** Each of the Security Interests created by this Deed is a continuing security for the due and punctual payment by [LCS] and [EMAC] of the Secured Liabilities and the observation and performance by [LCS] of all its obligations under Clause 2.1(b) and by [EMAC] of all its obligations under Clause 2.2(b).
>
> **3.2 Charterer's Assignment** [LCS], with full title guarantee, assigns to [the Plaintiff] absolutely subject to a proviso for re-assignment on redemption all rights and interests which now or at any later time it has to, in or in connection with, [LCS'] Assigned Property.

"Security Interest", whilst not defined in the GA, was defined in cl 53.1 of the BCP as meaning, *inter alia*, a mortgage, charge (whether fixed or floating) or

pledge, any maritime or other lien or any other security interest of any kind and the security rights of a plaintiff under an action *in rem* or any other right which confers on a creditor or potential creditor a right or privilege to receive the amount actually or contingently due to it ahead of the general unsecured creditors of the debtor concerned.

4 Pursuant to the GA, LCS, as chargor, filed a 'Registration of New Charge' at ACRA in favour of the Plaintiff, as chargee, on 26 February 2014, describing the instrument creating or evidencing the charge as "GENERAL ASSIGNMENT". The Charge lodged at ACRA contained three Appendices, (marked A, B and C), and two pages of salient provisions and definitions taken from the GA. Appendix B set out the negative pledge and prohibition of disposal of assets contained in the GA: "There are important restrictions and prohibitions in the Charge which may affect the rights of any person dealing with the Chargor. Full reference should be made to the Charge which is available for inspection as described below."

5 As noted above, there was an undertaking, both under the BCP and the SBCP, to remove the old crane, strengthen the Vessel's structure and install a new crane; this was to be carried out in two phases:

(a) The first phase involved removal of the existing crane and the reinforcement, conversion and upgrading of the Vessel's structure supporting and/or associated with the new crane.

(b) The second phase involved the installation of the new crane on the Vessel. Installation of the new crane was to be carried out by Huisman Equipment BV at a yard in Xiamen, China.

6 The first phase works ("the Crane Upgrading Works") was carried out

by the Defendant in its yard in Singapore pursuant to a Crane Upgrade Agreement dated 23 November 2015 ("CUA"), entered into between LCS and the Defendant for an estimated price of $8,700,000. The Defendant completed these works on the Vessel and it was re-delivered on 11 April 2016. It appears that there were still substantial sums outstanding to the Defendant in respect of these works when the Vessel left the Defendant's shipyard.

7 Clause 13.9 of the CUA provided, *inter alia*, that the CUA was governed by Singapore law and "[a]ny dispute arising out of or in connection with [the CUA], including any question regarding its existence, validity or termination shall be submitted exclusively to and finally resolved and amicably settled by arbitration in accordance with the rules of The Singapore Chamber of Maritime Arbitration".

8 There were delays for the second phase, the installation of the new crane, which was extended twice, first from 30 June 2015 to 31 March 2016 and subsequently to 31 December 2016.

9 The Plaintiff alleged numerous defaults by LCS, including being behind on its payments of charterhire under the BCP and payments under the CUA, which amounted to events of default under the BCP; in or around 9 March 2017, the Plaintiff terminated the BCP and demanded payment of US$194,499,500. LCS failed to make payment and the Plaintiff applied to wind up LCS on 5 May 2017. LCS was wound up on 14 July 2017 and liquidators were appointed.

10 Prior to the termination of the BCP and the winding up of LCS, the Defendant issued an *In Rem* writ (HC/ADM 27/2017) for a claim of $5.8 million on 14 February 2017. The defendant named on the writ was "Demise Charterer of the Vessel"; it did not include the Plaintiff owner as a defendant.

11 On 21 August 2017, the Defendant filed a proof of debt of $4,971,098.65 in the liquidation of LCS for outstanding sums under the CUA.

12 The Plaintiff subsequently entered into a bareboat charter party with Subsea 7 International Contracting Ltd ("Subsea 7") for the Vessel on 29 June 2017 for a period of 36 months at a hire rate of about US$35,000 per day.

13 On or about 8 January 2018, the Defendant applied to and obtained an order from the Sharjah Federal Court of First Instance ("Sharjah Court") for a precautionary attachment against the Vessel and other attachment orders. It is important that I set out my findings here, (at [13] and [14]) on the nature and characterisation of the claim brought in Dubai. From the English translation of this document, the precautionary attachment proceedings named both the Plaintiff and LCS as the 1st and 2nd respondents respectively. The Vessel was arrested and detained from leaving Port Khalid, Sharjah, UAE (where she was lying). The Defendant's claim in the precautionary attachment papers is a claim for work done on the Vessel pursuant to a contract entered into between the Defendant and LCS dated 23 November 2015 and an outstanding balance of S$5,572,358. That claim was clearly one in contract against LCS. There was no claim articulated against the Plaintiff except reciting that the Plaintiff was the owner of the Vessel. The precautionary attachment was requested against the Vessel for a maritime debt, LCS was the charterer of the Vessel and the Defendant was entitled to effect a precautionary attachment to "fulfil the Petitioner's debts." I take this to be some translational or typing error but the purport is clear, *ie*, to satisfy the amounts owing by LCS to the Defendant petitioner for the works carried out to the Vessel under the contract. I pause to note that these precautionary attachment papers aver that the Defendant petitioner issued a number of commercial invoices on 14 April 2016 to LCS "with the total amount of the works, which is 9,254,198 Singapore Dollars".

LCS paid S$3,681,839 and the outstanding balance was S$5,572,358.

14 On or about 15 January 2018, the Defendant commenced a substantive suit (case reference '275-2018 commercial') in the Sharjah Court against the Plaintiff and LCS ("the Sharjah Proceedings") and evinced an intention to have the substantive dispute under the CUA heard there, (see [18] below). The Amended Statement of Claim, besides revising the figure claimed downwards to S$4,971,098.65, follows, fairly consistently, the precautionary attachment stating that it was a claim for an outstanding balance for works done to the Vessel, pursuant to a contract with LCS. However, there was a very material change in the claim. It now stated that the outstanding debt was owed "by the Defendants", *ie*, LCS *and the Plaintiff*. The order prayed for was that "the Defendant**s** to jointly and severally pay the Claimant the amount of SGD 4,971,098.65 … together with legal interest at the rate of 12% from the due date up to full payment." (emphasis in bold and underlined). There was a similar prayer for "the Defendants to pay charges, costs and attorney's fees." There is no explanation or statement in the Amended Statement of Claim as to why the Plaintiff owners were jointly and severally liable together with LCS for LCS's outstanding debt to the Defendant under a contract entered into between LCS and the Defendant, other than the averment that the Plaintiff was the owner of the Vessel.

15 The Plaintiff's solicitors, R&T, issued a Notice of Assignment (under the GA) to put the Defendant on notice of the Plaintiff's rights under the CUA. The Plaintiff's solicitors also commenced negotiations to provide security with the Defendant's solicitors. The Plaintiff's solicitors offered security in the form of a solicitor's letter of undertaking to the Defendant or a bank guarantee to be issued by a Singapore bank or a Singapore branch of an international bank which would cover the Defendant's alleged claims in full. The Defendant

rejected these offers of security and insisted on security provided by a bank guarantee issued by a UAE bank or cash to be paid into the Sharjah Court.

16 The Plaintiff contended that they had no banking arrangements in UAE and arranging for security via a bank guarantee issued by a UAE bank would cause delays. Further the Plaintiff alleged that by providing such form of security, even if the Plaintiff is held not liable but LCS is liable to the Defendant, that security would go towards satisfying the Defendant's claim against LCS.

17 The Plaintiff also contended that the Vessel was on charter, was alongside the quay in the midst of mobilisation and preparation for a project for the Saudi Arabian Oil Company and was due to depart Port Khalid on 18 January 2018. The Plaintiff would face huge losses if the Vessel failed to leave Port Khalid on that date.

18 The Plaintiff received the Defendant's UAE lawyers letter of 16 January 2018 stating that the Defendant's intention of arresting the Vessel was to "…pursue full recovery of the debts [under the CUA] before the UAE Courts, with costs, expenses and interest, to completion."

19 The Plaintiff brought an action HC/OS 83/2018 and applied, *inter alia*, for an anti-suit injunction ("ASI") against the Defendant restraining it from maintaining the arrest of the vessel through the Sharjah Proceedings on the basis that the Sharjah Proceedings are oppressive and vexatious and/or that the Sharjah Proceedings has been brought in breach of an arbitration agreement. At the *ex parte* stage, with the Defendant present, the Plaintiff offered and I ordered that the Plaintiff's solicitors were to give a letter of undertaking on the usual terms, to the Defendant's solicitors and the Defendants were to release the Vessel from arrest. This was to preserve the status quo and it was equivalent to

the Defendant obtaining security in *in rem* proceedings against the vessel. This would avoid an enormous escalation of damages by preventing the Vessel from performing its obligations under the Subsea 7 bareboat charter and the Saudi Arabian Company contract. The parties then came back before me to argue whether the ASI should be granted and/or continued. The Plaintiff based its application for an ASI on two alternative and independent grounds:

(a) under s 4(10) of the Civil Law Act and s 18(2) read with the First Schedule of the Supreme Court of Judicature Act on the basis that the Defendant's commencement and conduct of the Sharjah proceedings are vexatious and/or oppressive;

(b) pursuant to s 12A of the International Arbitration Act read with O 69A of the Rules of Court, on the basis that the Plaintiff is enforcing its contractual rights as assignee of LCS's contractual rights under the CUA between LCS and the Defendant.

Whether an Anti-Suit Injunction should be granted

20 The Court of Appeal in *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] SGCA 42 ("*Lakshmi Salgaocar*") at [49], summarised the settled principles governing ASIs as follows:

(a) the jurisdiction to grant an ASI will be exercised only when required by the ends of justice;

(b) the ASI is directed against the party pursuing the foreign proceedings, and not against the foreign court or the foreign proceedings;

(c) the ASI will be issued only against a party amenable to the jurisdiction of the court, against whom the injunction will be an effective remedy; and

(d) as a matter of international comity, because an ASI indirectly affects foreign proceedings, the jurisdiction to grant it must be exercised with caution.

21 In *BC Andaman Co Ltd and others v Xie Ning Yun and another* [2017] 4 SLR 1332 at [56], I agreed with Belinda Ang J in *Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) and others v Hong Leong Finance Ltd* [2013] 3 SLR 409 ("*Morgan Stanley*"), where the learned judge identified five such factors at [26], (this too has been repeated subsequently in *Lakshmi Salgaocar* at [53] and additionally citing *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*John Reginald*") at [28]–[29]) that the following factors are relevant to the grant of an ASI:

(a) whether the defendant is amenable to the jurisdiction of the Singapore court (see also [2020(c)] above);

(b) whether Singapore is the natural forum for the resolution of the dispute between the parties;

(c) whether the foreign proceedings are vexatious or oppressive to the plaintiff if they are allowed to continue;

(d) whether an ASI would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

(e) whether the commencement of the foreign proceedings is in breach of any agreement between the parties.

I note Belinda Ang J nevertheless cautioned that these factors are not independent of each other, and emphasised that the factors must be looked at in the round. I respectfully agree.

Whether Singapore is the natural forum

22 I have noted the following factors in this case:

(a) the Defendant is amenable to the Singapore court's jurisdiction as it is a Singapore incorporated company and operates a shipyard in Tuas, Singapore;

(b) all parties directly involved in the first stage of the crane upgrade works are incorporated and based in Singapore and it appears the CUA was signed in Singapore;

(c) the Vessel is flagged in Singapore;

(d) the Crane Upgrading Works were carried out to the Vessel in the Defendant's shipyard in Singapore, and upon completion, the Vessel was released to and accepted by LCS and/or EMAC in Singapore;

(e) the invoices that the Defendant relies on for its claims were issued in Singapore;

(f) the Defendant's nominated bank account for payment is the Singapore branch of Citibank N.A;

(g) the CUA is governed by Singapore law, and UAE law, save for the arrest of the Vessel in Dubai, is not the governing law of the dispute between the Defendant and LCS;

(h) LCS is presently being liquidated in Singapore; and

(i) the Defendant lodged a proof of debt for its claims under the CUA in Singapore in the liquidation of LCS.

23 In contrast, there is no connection between Sharjah/UAE and the dispute, save for the fortuitous presence of the Vessel in Sharjah waters when it was arrested over four and a half months after the Defendant filed its proof of debt in the liquidation of LCS in Singapore.

24 I find the natural and most appropriate forum is clearly Singapore.

Whether there is vexatious and oppressive conduct on the Defendant's part

25 I also find that there has been vexatious and oppressive conduct on the part of the Defendant. This includes:

(a) The Defendant naming the Plaintiff as a Defendant in the Sharjah Proceedings and alleging that LCS *and the Plaintiff* are jointly and severally liable to pay the Defendant for the outstanding sums in relation to the crane upgrading works carried out at their yard. This allegation was made despite the termination of the BCP being made known in local newspapers and announcements made with the Singapore Exchange. Further, the Vessel was no longer in the possession of LCS at the time it was arrested in Sharjah.

(b) The Vessel was seized in Sharjah almost 6 months after LCS was wound up in Singapore and over four and a half months after the Defendant filed its proof of debt in the liquidation of LCS.

(c) The Defendant refused offers of security by way of a Rajah & Tann Letter of Undertaking ("R&T LOU"), insisting that security be furnished by way of a bank guarantee issued by a bank in Sharjah or payment into the Sharjah Court. I accept the Plaintiff's expert evidence that once security is so furnished, that sum will also answer to the liability of a co-defendant in the substantive suit. Even if the Plaintiff is adjudged not liable to the Defendant, that security will also answer to LCS's liability. In saying so, I do accept that a claimant with a valid claim can, (provided it satisfies the legal requirements to do so), and has the right, to invoke *in rem* proceedings in various jurisdictions around the world. However, if that country is not the natural or especially the agreed forum, then the arrest is, usually, to obtain security. Had the Vessel sailed into Singapore, the Defendant could have arrested the vessel or served a Writ in Rem on the Vessel claiming for the unpaid sums after they became due, subject of course to proof of the same. However, unlike the proceedings in Sharjah, I note the Writ in Rem issued by the Defendant in Singapore did not name the Plaintiff as a party to the action.

(d) In filing a substantive suit in the Sharjah Proceedings, the Defendant did not just want to obtain security for its claim, but expressed its intention to have the substantive merits of the claim determined in its substantive suit filed in Sharjah. In those proceedings, the Defendant sought to hold the Plaintiff jointly and severally liable for the debt incurred by LCS under a contract to which the Plaintiff was not a party.

In the Defendant's Amended Statement of Claim in those proceedings, there was first, as noted above, no averment as to how the Plaintiff came to be jointly and severally liable with LCS for LCS's debts and secondly, no limitation on the Plaintiff's liability, for example, up to the value of the vessel or the proceeds of sale of the vessel.

(e) Unlike the Writ in Rem filed by the Defendant in Singapore, the Defendant's basis of its claim in Sharjah, *ie*, that the Plaintiff is liable jointly and severally with LCS for the latter's debt to the Defendant, is clearly unsustainable on the facts of this case. As noted above, the CUA was governed by Singapore law. Mr Yap, counsel for the Defendant, was unable to tell me how or why this joint and several liability came about, other than that I should not look at the claim in Sharjah through the lens of Singapore law and that there was some practice, (but not a legal requirement), to name a vessel's owner as a defendant in legal proceedings in Sharjah. Mr Yap was also unable to satisfactorily answer my query as to what would happen if judgment was entered for a sum greater than the value of the vessel. The Plaintiff would end up on public record as being liable *in personam* on a judgment debt for that difference to the Defendant and therefore liable to have its assets seized in any other part of the world on that judgment debt. Mr Yap's answer was as follows:

> Court: Mr Toh's point is that if I look at the Sharjah Statement of Claim, you are praying for judgment against the Plaintiff in the Sharjah proceedings, and the Value of the vessel is not enough, you have a judgment for $4.97 million. And you can go to other jurisdictions and say you have a judgment. How is he going to say that it is limited to [the value] of the vessel? The judgment does not say that it is limited to the vessel?
>
> Mr Yap: In Sharjah, execution against [the Plaintiff] is only limited to the value of the vessel. How the judgment is effected is not explained, but [the Defendant's expert] has said that only

> the vessel can be executed to satisfy the debt. If we bring proceedings to enforce the judgment out of Sharjah, then we can be restrained by an ASI.
>
> Court: My problem is that based on your Statement of Claim, there is nothing which says that Hai Jiang's liability is limited to the vessel's value?
>
> Mr Yap: Yes it does not say that. But [the Defendant's expert] has said that in law it would be so restricted. Also refer to Bashir's 2nd affidavit at para.29.
>
> Court: (1) it does not say how the judgment will read, and (2) what happens if the sale proceeds from the vessel are less than the maritime debt?
>
> Mr Yap: Also refer to Bashir's 2nd affidavit, p 19, para (b).
>
> Court: My concern is that judgment against [the Plaintiff] will read as a judgment for $4.97 million.
>
> Mr Yap: I appreciate Your Honour's concern. All I can say is what I have said previously.

(f) When the proceedings were first commenced in Sharjah to arrest the Vessel, although the Plaintiff was named as first respondent, there was no claim articulated against the Plaintiff. The claim, dated 8 January 2018, recited Article 117 of the Maritime Commercial Law (which provides: "If the vessel has been chartered to a charterer, together with the right of navigational management thereof, and he alone is responsible for a maritime debt connected therewith, the creditor may arrest the said vessel…"), recited fulfilment of the requirements of Article 117 and alleged a contract between the Defendant (the plaintiff in the Sharjah proceedings) and LCS for works to be carried out on the vessel, due performance of those works, the rendering of invoices by the Defendant to LCS and non-payment by LCS without any legal justification. Except for one word, "Respondents", in the plural, found only in para 10 of the claim: "It is established that the amounts owed by the Respondent**s** are maritime debts…" (emphasis and underlining added), the whole text and tenor of the claim was one against LCS with

brief mention that the Plaintiff was the owner of the Vessel. An amended claim was filed on 28 January 2018 and in this claim, the allegation was unambiguously made that the Plaintiff was jointly and severally liable with LCS in respect of the outstanding debts for the works carried out on the Vessel together with interest at the rate of 12%, charges, costs and attorney's fees.

(g) LCS has been wound up in Singapore. The Defendant filed a proof of debt in the LCS liquidation. Upon its winding up, the Defendant could not have issued *in personam* proceedings against LCS without leave of court. Its commencement of a substantive suit in Sharjah against the Plaintiff and LCS is a circumvention of the liquidation process of LCS in Singapore (as stated in paragraph (c) above, this does not include the right to invoke the admiralty jurisdiction against the *res* in another jurisdiction).

(h) Sharjah is not an appropriate forum for the resolution of the disputes comprised in this matter.

The Existence of a binding Arbitration Agreement

26 I now turn to whether there is a valid or binding arbitration clause covering this claim. Some of the Plaintiff's arguments on their first ground for an ASI, (approbation and reprobation, ignoring a jurisdiction and/or arbitration clause), are based on or overlap with their second ground, the existence of an arbitration agreement.

27 In this respect, the Plaintiff rests its submissions on two separate grounds:

(a) First, whether the agreement to arbitrate disputes in cl 13.9 of the CUA had been assigned by LCS to the Plaintiff pursuant to the GA.

(b) Second, whether the Plaintiff could otherwise avail itself of and bind the Defendant to comply with that agreement.

The Standard of Proof

28 It is clear from the principles set out in [20] and [21] above that the jurisdiction to issue an ASI is to be exercised with caution and, *inter alia*, only when it is required by the ends of justice.

29 Whilst the standard for establishing *forum conveniens* is said to be high, *ie,* a defendant seeking a stay "...must not merely show that the English Court is not the optimal forum for resolution of the dispute, but that there is an alternative court which is 'clearly or distinctly more appropriate'…" (see *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 477, Richard Fentiman, *International Commercial Litigation* (Oxford, 2nd Ed, 2015) at para.13.39) ("*Fentiman*") but "[t]hat the burden of proof varies in different situations, and in connection with different issues, is, however less important in practice than in theory. Indeed it has been said that the burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties…" (citing *Amchem Products Inc v Workers Compensation Board of British Columbia* (1993) 102 DLR (4th) 96), *Fentiman* at para.13-37. I have found that Singapore is clearly the natural and most appropriate forum (see [24] above).

30 It is settled law that the standard of a *prima facie* case has been adopted in the context of stay applications under s 6 of the International Arbitration Act

(Cap 143A, 2002 Rev Ed) ("IAA"): *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*"). In particular, the *prima facie* test should be applied when determining whether "there is a valid arbitration agreement between the parties to the court proceedings": *Tomolugen* at [63].

31 Should the same standard be adopted in the context of an application for an ASI? There appears to be no local authority on this issue. The English approach ("high degree of probability") and a "full merits approach" when hearing stay applications under s 9 of the UK Arbitration Act was rejected in *Tomolugen* (see [63]-[70]) by our Court of Appeal. The plaintiff has also referred to a case from the Hong Kong Court of Appeal (*Liaoyang Shunfeng Iron and Steel Co Ltd v Yuen Tsz Wang* [2012] HKCU 1267), but it is unhelpful, because one judge in that case adopted the test of a "strong *prima facie* case" while another judge adopted the "high degree of probability" test.

32 In my judgment, when considering the grant of an ASI on the basis of an arbitration clause, the *prima facie* test should be applied to determine whether there is a valid and binding arbitration agreement. This is because regardless whether the plaintiff is applying for an ASI or a stay under s 6 of the IAA, the underlying question is the same, *ie*, whether the proceedings should proceed to arbitration. Thus, it would be incongruous for the courts to adopt different tests in these two contexts. Further, as the plaintiff points out, adopting a higher threshold would encroach upon the principle of *kompetenz-kompetenz*, undermining the arbitral tribunal's role in ruling on its own jurisdiction. As the Court of Appeal held at [67] of *Tomolugen*:

> If the claimant decides to pursue its claim by arbitration, the arbitral tribunal will determine any challenge to its jurisdiction, and thus, its *kompetenz-kompetenz* will be given full vent. But, if the claimant decides to pursue its claim by bringing

> proceedings in court (*instead* of by recourse to arbitration), the court will be seized of jurisdiction, and will be able (and, indeed, on the full merits approach, obliged) to make a full determination on the existence and scope of the arbitration clause; this will deprive the putative arbitral tribunal of its *kompetenz-kompetenz*. In our view, ***the strength of the kompetenz-kompetenz principle cannot depend on the arbitrary choice of the claimant as to whether it will pursue its claim by way of court proceedings or by way of arbitration***. [emphasis in bold and italics added]

This reasoning applies with equal force in the context of an ASI application: the strength of the *kompetenz-kompetenz* principle cannot depend on whether the defendant pursues its claim by instituting foreign leading proceedings or by way of arbitration.

33 The plaintiff argues that the *prima facie* test cannot be applied here because it can only be applied to questions of fact, while the existence of an arbitration agreement in this case hinges on pure questions of law. Thus, they submit that the standard of review should instead be a "good arguable case".[1] With respect, I do not agree. The *prima facie* test can and has been applied to questions of law. For example, the test for obtaining leave to commence judicial review proceedings is a *prima facie* case of reasonable suspicion. And it is clear that judicial review applications can consist of a pure question of law, such as the interpretation of the Constitution: see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850. Another example would be the test for leave to appeal – whether there is a *prima facie* error of law: *IW v IX* [2006] 1 SLR(R) 135 at [20].

34 Thus, in line with *Tomolugen*, the *prima facie* test should be adopted to determine whether "there is a valid arbitration agreement between the parties to

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1 Plaintiff's rebuttal and supplemental submissions at paras 84–89.

the court proceedings" in the context of an application for an ASI in favour of arbitration. Since the issue of assignment is directly relevant to whether there is an arbitration agreement between the Plaintiff and the Defendant, the *prima facie* test should also be applied to the question of whether the arbitration agreement had been assigned to the Plaintiff or whether the Plaintiff can otherwise avail itself of the arbitration agreement.

Assignment of the Arbitration Clause by the General Assignment

35 Having considered the standard of proof, I first turn to the Plaintiff's secondary ground that there has been an assignment of the arbitration clause. Refuting that there was such an assignment was the initial focus of Mr Yap's submissions, whereas Mr Toh SC's main ground for the grant of an ASI under the Civil Law Act and the Supreme Court of Judicature Act was his first ground, *viz*, the Defendant's vexatious and oppressive conduct, where he lists eight grounds and only one of which rests on an arbitration clause.

36 The Plaintiff relies on an assignment under cl 3.2 of the GA (see [3] above). The material assignment reads: "The Charterer, with full title guarantee, assigns to the Owner absolutely … all rights and interests which now or at any later time it has to, in or in connection with, the Charterer's Assigned Property." Cl 1.2 defines "Charterer's Assigned Property" as:

> all rights and interests of every kind which the Charterer now or at any later time has to, in or in connection with:
>
> (a) the Charterers Earnings;
>
> (b) the Charterer's Insurances;
>
> (c) the Charterer's Assigned Contract Rights; and
>
> (d) any Requisition Compensation.

37 The "Charterer's Assigned Contract Rights" is also defined in cl 1.2 as meaning:

> all rights and interests of every kind which the Charterer now or at any later time has to, or in connection with the [SBCP] or in relation to any matter arising out of or in connection with the [SBCP], including without in any way limiting the generality of the preceding words:
>
> (a) all rights and interests relating to hire or any other amount of any kind payable under the terms of the [SBCP];
>
> (b) all rights to have [EMAC] take the Vessel on charter pursuant to the [SBCP] or to withdraw the Vessel from the [SBCP];
>
> (c) all rights to commence, conduct, defend, compromise or abandon ***any*** legal or ***arbitration proceedings relating*** to the [SBCP] or ***to any matter arising out of or in connection with the [SBCP]***; and
>
> (d) all rights to damages, interest, costs or other sums payable under any judgment or order of any court, or any arbitration award, relating to the [SBCP] or to any matter arising out of or in connection with the [SBCP];
>
> (emphasis in bold and italics added)

38 Mr Toh SC submits that LCS has assigned all its rights and interests, which it now has or at any later time has, to, in or in connection with "the Charterer's Assigned Property" to the Plaintiff. The Charterer's Assigned Property includes, *inter alia*, the "Charterer's Assigned Contract Rights" which, in turn, includes, *inter alia*, all rights to commence, conduct, defend,

compromise or abandon any legal or arbitration proceedings relating to any matter arising out of or in connection with the SBCP. Mr Toh SC submits:

(a) The obligation to carry out the removal of the existing crane, strengthening of the Vessel's structure to receive the new crane and then to install the new crane are obligations undertaken by LCS and EMAC pursuant to the back-to-back obligations under the SBCP.

(b) Cl 2.2(b) of the GA specifically provides that in consideration of allowing LCS (as charterer) to sub-charter the Vessel to EMAC, EMAC covenants with the Plaintiff (as owner), to pay and guarantee the due and punctual payment of the secured liabilities (which is carefully defined), and observe and perform all its other obligations to LCS and the Plaintiff as assignee under the SBCP.

(c) The crane was effectively paid for by the Plaintiff in the sale and lease-back pricing; this is borne out by the obligation of LCS to do the crane removal, strengthening of the Vessel's structure and installation of a new crane at its cost, but upon installation title to the crane vested in the Plaintiff. It is for this (and other reasons) that the GA is a tripartite agreement between the Plaintiff, LCS and EMAC and creates the privity between the Plaintiff and EMAC.

(d) The Plaintiff registered its general assignment and security interest with ACRA and that was constructive notice of the same to all third parties.

(e) LCS and EMAC were all part of the same listed Ezra Holdings Ltd group of companies (the "Group") involved in the oil and gas industry. LCS and EMAC shared the same address. LCS is wholly

owned by EMAS Offshore Ltd and EMAS Offshore Ltd in turn is wholly owned by Ezra Holdings Ltd.

(f) EMAC managed the CUA works; the owner's representative was stated as LCS but "c/o EMAS AMC Pte Ltd", for the attention of one Gerard Velthoen and Sebastien Brochard at an EMAC email address; all draft invoices were to be sent to designated EMAC personnel; and all hard copy invoices under the CUA were to be delivered and addressed to one Ms Callista Chen, Procurement and Subcontracts, at EMAS Offshore Ltd.

(g) I would add that in reviewing the documents, I noted that the CUA documentation includes EMAC documents, (with two of the same initials at the bottom of each page as those of the CUA), *viz*, the Docking Job List, the Scope of Works Demarcation List and a document titled "HSE & QUALITY REQUIREMENTS FOR SHIPYARDS PROVIDING DRYDOCK AND OTHER RELATED WORKS", which defined minimum health, safety, environmental and quality obligations to be met.

(h) The payments to the Defendant under the CUA came from different entities. It is far from clear exactly how much the Defendant was paid under the CUA for the works it carried out to the Vessel as the allocation of lump sum payments from different entities appear to be unilaterally allocated by the Defendant to the different projects of the Ezra group companies on which they were owed monies. Of the $3,625,000 the Defendant says it was paid, the first tranche was paid by the sub-charterer, EMAC, the second tranche was paid by LCS and the third tranche (comprising the last two payments in February 2017) was

paid by an entity, Emas Offshore Services Pte Ltd, that has not featured in the dispute.

(i) There are 3 vessels named in the 1st Affidavit of the Defendant's Ms Toh Siew Hoon at page 148; it is obvious that the Defendant had a relationship with the Group and there were other on-going projects. Payments were made by entities within the Group and the Defendant unilaterally allocated sums to the different projects, which were under different companies. In this respect I note that:

(i) at page 148, in an email dated 8 February 2017, $1 million was paid and Ms Toh split the payment to four vessels as follows: Under EOS PL, Lewek Conqueror – $180,320; Lewek Antares – $76,666.67 and Lewek Heron – $ 18,01.33 [*sic*] and under LCS, in respect of the Vessel – $725,000;

(ii) at page 147, in an email dated 14 February 2017, another $1 million was allocated by Ms Toh as follows: under EMAS Offshore, Lewek Heron (balance of 1st instalment due on 12 August 2016) - $8,398.27; Lewek Alkaid (balance of 1st instalment due on 29 August 2016) – $162,700.38; under LCS, in respect of the Vessel, $725,000 being the 3rd instalment due on 12 August 2016 and a balance of $103,901.35.

(j) With these unilateral allocations and payments, can it be said that the Defendant remained unpaid for the work carried out by them on the Vessel? No contractual basis has been shown for these allocations to different vessels. The CUA contained an entire obligations [*sic* contract] clause. Importantly, 14 February 2017 is the day the Defendant filed its Writ in Rem in Singapore. It therefore received various sums of money,

unilaterally allocated portions of this sum to the Vessel and then filed a writ for the balance.

(k) In addition, some of the payments to the Defendant, ($725,000 and $103,901 on 13 February 2017 and $725,000 on 6 February 2017), may be caught by the preference period in relation to the date LCS was wound up and there may potentially be a clawback by the Liquidator for these amounts.

39 Mr Toh SC also submits that it is clear the Defendant knew the works being carried out on the Vessel were at the behest of LCS and EMAC and they were aware of the BCP, the SBCP and the back-to-back obligations contained in those charterparties. Leaving aside any oral evidence that may be subsequently given, that much is clear on the documentary evidence before me and which is set out above. The Defendants must be deemed to have constructive notice of the GA when they entered into the CUA. That must include the fact that under the GA, LCS had assigned not only all present rights and interests but also those that may accrue to LCS in the future. I note the GA was dated 26 February 2014 whilst the CUA, with the prohibition against assignment, was dated almost 1 year 9 months later, 23 November 2015. Mr Toh SC said he was not contesting the prohibition against assignment but the unreasonable withholding of consent to the assignment in the context of the facts of this case if the Defendant refused to do so.

40 Mr Toh SC emphasizes that I do not have to come to a firm view on whether there had been an assignment of the arbitration clause. The facts and factors outlined by him made out a *prima facie* case that there is a valid arbitration clause binding the Defendant to arbitrate its claim in accordance with the CUA.

41 Mr Yap on the other hand submits that the definition of "Charterer's Assigned Contracts Rights" should not be interpreted literally. Rather, "repeated reference to the [SBCP]" shows that it "was meant to, and does, limit the scope of LCS' assigned contract rights under the [GA] to only those arising out of or under the [SBCP] as between the parties to it".[2] In other words, the scope of the assignment covers only rights between LCS and EMAC, and not between LCS and third parties such as the defendant (the CUA falling under the latter category). In arriving at this interpretation, Mr Yap referred to numerous other clauses in the GA to the same effect.[3] As the BCP and SBCP were governed by English law, Mr Yap produced an opinion from Christopher Smith QC to support his arguments.

42 Mr Yap also laid emphasis on the fact that although EMAC owed similar obligations up the charter chain to LCS, under the BCP, it was LCS that that carried that identical obligation and it was LCS which entered into the CUA with the Defendant.

43 Mr Yap submitted that the decision in *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221 ("*Foamcrete*"), insofar as the Plaintiff relies on its proposition that if the agreement to assign predates the clause prohibiting assignment, then the prohibition does not operate, has not been cited or followed in Singapore. It has attracted a lot of criticism and that case is distinguishable on its facts. He therefore submits I should not follow that decision and it should be narrowly confined to its facts. I pause here to note that Mr Toh SC's submission that *Foamcrete* has not, to date, been overruled is a valid point. I find the reasoning in that case compelling. The assignment in *Foamcrete* pre-

2 Defendant's written submissions at para 53.
3 Defendant's written submissions at paras 41–83.

dated the prohibition against assignment and after the contract containing the prohibition against assignment was entered into, the assignor went into liquidation, thereby causing the floating charge to crystallise. Mummery LJ held that the bank's security rights over the debt due did not derive from any assignment made in breach of the prohibition clause, but from the antecedent floating charge. That floating charge was lawfully created before the prohibition and the bank acquired a beneficial interest in that future debt, (see [29]). Otherwise, it would appear that the company could, without the consent of the chargee, remove assets entirely from the reach of an existing floating charge by agreeing that property subsequently created (or acquired) and vested in the company from time to time, would be subject to the prohibition either at all or without consent, (see [32]). Indeed, the reasoning in *Foamcrete* has been implicitly endorsed in Singapore, see *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and Others v BP Singapore Pte Ltd and another matter* [2018] SGHC 215, at [88]–[92] where, in addressing a similar reliance on *Foamcrete* for the validity and efficacy of a floating charge over receivables created before a contractual prohibition against assignments was entered into, Abdullah J held that receivables were charged from the moment they arose and that there was no opportunity for any subsequent contractual prohibition against charging to take effect.

44 In any event, the submissions also raised a number of legal issues such as the effect of the earlier lodgement of notice of a charge, whether the assignment was a charge or floating charge or some other "Security Interest" (which, as noted above, was not defined in the GA but was defined in the BCP) and whether the prohibition against assignment in the CUA prevented any assignment of the arbitration clause (in which case the question of whether consent to assignment was unreasonably withheld would also arise). Given the views I hold, as set out below, and the stage at which these proceedings are

currently at, I do not think it necessary or desirable that I deal with these points as they will be, in due course, canvassed before the arbitral tribunal.

45 Upon perusal of the words used in the provisions and the definitions in the GA and the BCP, the assignment does seem confined to LCS's rights under the SBCP. The only words Mr Toh SC could base his submission upon were those set out under the definition of "Charterer's Assigned Contract Rights" at sub-paragraph (c): "all rights to commence, conduct, defend, compromise or abandon *any ... arbitration proceedings …* ***to any matter arising out of or in connection with the Sub-Bareboat Charter***" (emphasis in italics and bold). Mr Toh SC submits that the obligation to carry out the Crane Upgrade Works in the SBCP, with the back-to-back obligations flowing up to the BCP and the entry into the CUA by LCS with the Defendant to carry out those works, and given the factual submissions, especially the apparent knowledge of the Defendants of these obligations (set out at [37] above), any issues over the Crane Upgrade Works, including payment therefor, can be said to arise out of or in connection with the obligations in the SBCP and therefore within the arbitration clause in cl 13.9 in the CUA (see [7] above). Whilst I entertain considerable reservations on whether those words in sub-paragraph (c) did, at the end of the day, assign the rights and benefits of the arbitration clause in the CUA to the Plaintiff, Mr Toh SC does raise, (but just barely so), a *prima facie* case. I do not need to make that final decision here; it is the province of the arbitral tribunal under the principle of *kompetenz-kompetenz*. In the light of the apparent knowledge of these obligations by the Defendant and [36(c)] above, and *especially* given my views on Mr Toh's alternative ground, there is just enough on this ground to send this case to the arbitral tribunal for it to decide this issue.

46 It goes without saying that anything I say in this judgment is not binding in any way on the arbitral tribunal.

The Sea Premium Shipping Ltd v Sea Consortium Pte Ltd line of cases

47 I now turn to Mr Toh SC's alternative ground based on a line of cases beginning with *The Sea Premium*, for the principle that a claimant whose cause of action arises under a contract remains bound by the dispute resolution clause in that contract when pursuing a claim thereunder, albeit against someone who is not a party to that contract either by way of novation or subrogation.

48 The facts of *The Sea Premium* are rather convoluted but it is necessary to outline the salient facts to appreciate the rule:

(a) Owner A, a Cypriot company, chartered a vessel to BXCL (a Jersey company), on the New York Produce Exchange Form with an arbitration clause for any disputes arising thereunder to be submitted to English arbitration. The charterparty allowed for a sale of the vessel during the currency of the charter, after obtaining the charterer's consent, which could not be unreasonably withheld. Various addenda were entered into extending the charter and in the process Owner B became owner of the vessel and the benefits of the charter were transferred to the respondents. Owner B ran into financial difficulties and the mortgagee stepped in and exercised its rights to sell the vessel. This is when the applicants expressed an interest in buying the vessel. Further complications arose, *eg*, the seaworthiness and age of the vessel, a major breakdown of her engines and the claims filed against the vessel. These caused the sale to fall through. Eventually, the applicants, after re-opening negotiations to purchase the vessel, succeeded in purchasing the vessel "charter free" and at a nominal consideration as the vessel required major repair works to render her seaworthy and to return her to a trading condition. The applicant was not prepared to incur large sums of money in repairs to the vessel without being free to charter the vessel

at market rates, which had by then moved in favour of the owners. The vessel was towed to Dubai where it underwent extensive repairs at the applicant's expense.

(b) Meanwhile, the respondent had hired a replacement vessel at a significantly higher rate of hire.

(c) A dispute then arose between the applicants (the 'third' successor owner), and the respondents (the second successor charterer). The respondents felt that they were entitled to rely on the charterparty but the applicants, who had purchased from a mortgagee, felt they were free, having spent large sums to make her seaworthy, to return her into service at current market rates.

(d) The respondents arrested the vessel in Dubai and pursuant to Dubai law, issued substantive proceedings in Dubai in respect of their claim.

(e) Their claim was against the past and present owners in damages for breach and dishonouring of the charterparty, and consequential damages of having to hire an alternative vessel at a higher rate.

49 Steel J first examined the respondents' claim in Dubai and found there was no coherent attempt to distinguish between the position of the old owner and the new owner. Having reviewed the pleadings and case, he concluded that a realistic categorisation of the nature of the cause of action in Dubai was that it was contractual rather than delictual. The question of whether the applicants and the respondents were bound by the arbitration clause was a matter to be decided by English law. He held that the respondents' claim in Dubai was quasi-contractual in nature. The learned judge referred to two cases by analogy:

(a) *Schiffahrtsgesellschaft Detlev von Appen v Voest Alpine Intertrading ("The Jay Bola")* [1997] 2 Lloyd's Rep 279, where an insurer, as the assignee of the voyage charterer, was held to take the assignment with the benefit and burden of the arbitration clause; and

(b) *John Richard Ludbrooke Youell and others v Kara Mara Shipping Co Ltd and others* [2000] EWHC 220 (Comm) where Aikens J held that underwriters asserting rights under a Louisiana direct action statute were bound by the arbitration clause,

and held that the claim asserted by the respondents was a quasi-contractual claim for damages for failing to abide by the terms of the charterparty, and in so doing, the respondent charterers were bound by the arbitration clause vis-à-vis any claim arising between both the owners and the charterers:

> I agree that the analogy is not complete, but in my judgment the present case should be decided to similar effect. The English court is entitled, using English law concepts, to analyse the nature of the claim being brought by the respondents in Dubai. As I have already indicated, the claim asserted by the respondents is by way of a quasi contractual claim for damages for failing to abide by the terms of the charterparty. In short, it is a claim made against the owners under the charter, albeit the owner are not a party to the charter either by way of novation or assignment. Because the charterparty is governed by English law, the question whether the charterers are bound by the arbitration clause is also governed by English law. In my judgment, the charterers are bound by the clause vis-a-vis any claim arising between both the owners and the charterers. The new owners, whom the charterers contend are bound to abide by the terms of the charter, are accordingly entitled to prevent the charterers from pursuing the Dubai proceedings in breach of the arbitration clause.

50 Steel J therefore granted an ASI against the respondents from continuing the Dubai proceedings, subject to the issue of adequate security. He did not however grant, in the light of his earlier findings, an injunction requiring the release of the vessel from arrest.

51 The second case is *Jewel Owner Ltd and another v Sagaan Developments Trading Ltd (the "MD Gemini")* [2012] EWHC 2850 (Comm) ("*The MD Gemini*"). The owner, a Bahamian company with a place of business in Florida and registered as a foreign maritime owning entity in the Marshall Islands, chartered its vessel, the MD Gemini, to time charterers for a long-term charter under the Baltime form. The charterparty provided that the time charterers would provide and pay for all fuel oil (it was silent as to diesel oil). The charterparty was governed by US law and provided for New York arbitration. The owner appointed another corporation, ISP, as a technical manager for the owner. The time charterers purchased bunkers from Sagaan Developments Trading Limited, a BVI corporation, ("Sagaan"), which was supplied to the MD Gemini at St Petersburg; the first consignment on 29 August 2011 and the second on 13 September 2011. The time charterers failed to make payment. On 28 September 2011, the time charterers informed Sagaan that they were suspending operations and were unable to pay for the bunkers. On or about 21 October 2011, the MD Gemini was redelivered to the owner. By that stage, all the bunkers under the two consignments had been consumed. Sagaan demanded payment from the owner but they denied liability stating that the bunkers were supplied under a contract with the time charterers and they alone were liable to pay for the same. It was common ground that the supply of bunkers incorporated cl 19.1, in the following terms:

> Governing law: Save that the seller may take such action or actions as it shall in its absolute discretion consider necessary to enforce, safeguard or secure its rights hereunder in any court or tribunal or any state or country, the provisions hereof shall be governed by the law of England and the jurisdiction of the English courts.

52 Sagaan commenced proceedings in Florida against both the time charterer, the owners and ISP on 26 October 2011. Sagaan also commenced proceedings in the Marshall Islands on 31 October 2011 asserting a maritime

lien in *in rem* proceedings against the vessel and *in personam* proceedings against the owners claiming the price of the bunkers supplied. These proceedings in the Marshall Islands were eventually dismissed on 10 February 2012 as *forum non conveniens* and that there was an adequate alternative forum in Florida where all parties, including the time charterers, had been named as a party. In the Florida proceedings, lawyers for the owners and Sagaan then agreed to a timetable for directions through to the trial of the claim on the merits; this was subsequently embodied in a court order dated 6 June 2012 scheduling the progress of the proceedings through to a trial. This order included the appointment of a mediator. Two days before the appointment of the mediator, on 27 June 2012, the owner and ISP applied to the English Court *ex parte*, with two hours' notice by email, where they sought and obtained orders for service out of the jurisdiction and an interim ASI. The owner and ISP also sought declarations that the two consignments of bunkers were subject to English law and jurisdiction and that Sagaan was bound to refer any claim against the owners to the English court; a declaration that the owners were not a party to the bunker supply contract and that the owners were not liable for any outstanding sums due to Sagaan in respect of these consignments. The owners also claimed reimbursement of, or damages in respect of, sums incurred in defending the proceedings in Florida and sought a permanent ASI.

53 On the return date, Popplewell J stated that a contractual exclusive jurisdiction clause ought to be enforced unless there were strong reasons not to. However, on its true construction, cl 19.1 was not an exclusive jurisdiction clause. Even if it were, there was delay on the part of the owners in making their application for an ASI, the owners had positively promoted the Florida proceedings as the appropriate forum and secured relief from the Marshall Islands High Court on the basis that Florida was the jurisdiction in which the dispute could be most conveniently resolved on its merits. The learned Judge

therefore discontinued the ASI. However, Popplewell J went on to say, *obiter*, at [15]:

> …I should observe at the outset that, of course, the owners say they are not party to any agreement. They are therefore not in a position to assert in these proceedings that any proceedings brought are a breach of a bargain which was made with them. However, I am prepared to assume, although the matter was not fully argued before me, that they are entitled to be put in the same position as if they were parties to the contract containing clause 19.1 notwithstanding their averment that they are not a party. *It seems to me that that may be so because generally, it would be oppressive and vexatious for a party asserting a contractual right in a foreign jurisdiction under a contract which contains an exclusive jurisdiction clause in favour of England* ***to seek to enforce the rights under that contract without giving effect to the jurisdiction clause which is part and parcel of that contract notwithstanding that the party being sued maintains that it is not a party to that contract****.*
>
> (emphasis added in italics and bold italics)

54 It is important to take a step back to the Court of Appeal decision in *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 ("*The Angelic Grace*"). In *The Angelic Grace*, and the cases that came after (including the House of Lords decision in *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, which ratified the approach of *The Angelic Grace*) the English courts granted an ASI to enforce exclusive forum clauses unless there were strong reasons to the contrary. *The Angelic Grace* approach involved the situation where A entered into a contract containing an exclusive forum clause with B, and B, in breach of the exclusive jurisdiction clause, commenced foreign proceedings. Thus, the foreign proceedings had to be in breach of the exclusive jurisdiction clause, the ASI claimant must be entitled to enforce the clause, the clause must be binding and not invalid and the claim in the foreign proceedings must fall within its terms: see Thomas Raphael, *The Anti-suit Injunction* (Oxford University Press, 2nd Ed, 2019) at para 7.27 ("*Raphael*"). *The Angelic Grace* has been endorsed in Singapore: see *Maldives Airports Co Ltd and*

another v GMR Malé International Airport Pte Ltd [2013] 2 SLR 449 at [42]–[43]; *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [29] and *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016) at para 75.133.

55 An extension of this principle, perhaps uncontroversial, would apply where a party to the contract enforces the exclusive jurisdiction clause against any other party who is bound by the clause. A typical example would be an insurer who becomes subrogated to its insured's rights, or an assignee. They stand in the shoes of the insured or the assignor. Similarly, third parties can also claim to enforce an exclusive forum clause where they are contractually entitled to do so or where they have an equitable or statutory right to enforce the contract: see *Raphael* at para 7.28 where the learned author refers to *Horn Linie GmbH v Panamericana Formas e Impresos SA* [2006] 2 Lloyd's Rep 44 ("*The Hornbay*") in which Morison J held, *obiter*, that a third party could be entitled to enforce an exclusive jurisdiction clause where he was entitled to be treated as a party by virtue of a *Himalaya* clause. Another example arises in agency and undisclosed principals.

56 *The Sea Premium* in 2001 and *The MD Gemini* in 2012 extended this approach a step further. These cases show that the English courts take the view that, in general, they are entitled to treat a third party who wishes to take the benefit of the contract as bound by the burden of any exclusive jurisdiction clause therein. They have to come to name these "quasi-contractual" injunctions, not because there is any link to restitution, but because the third party is, strictly speaking, not making a claim under any contract.

57 In *The Sea Premium*, the ASI respondent had sued the ASI claimant, the new ship owner, in Dubai; the ASI claimant denied it was a party to that contract

(the charterparty) but nonetheless sought an ASI to compel the ASI respondent to bring his claim in English arbitration proceedings as required under the contract. In the *MD Gemini*, (assuming there was an exclusive jurisdiction clause in favour of England), the ASI claimant was the ship owner who claimed not to be a party to the bunker contract on which the bunker suppliers were suing in Florida. The ASI respondents in both these cases were pursuing claims under contracts to which the ASI claimants denied they were parties. They were non-parties to the contract enforcing an exclusive jurisdiction clause in that contract. In such situations, if the ASI respondents wished to pursue their claims against the ASI claimants despite their denial of being a party to or bound by the contract, then the ASI respondent had to observe the exclusive jurisdiction or arbitration clauses under the contracts upon which their action is based. In *Raphael*, the author classifies this sub-category of "quasi-contractual" ASIs under the heading "Inconsistent Contractual Claims" because the ASI claimant is either (i) denying the very existence of the contract under which he is being sued; (ii) denying the validity of the contract in a way which would impeach the exclusive jurisdiction clause; or (iii) denying that he owes any contractual duties or obligations to the ASI defendant, but the ASI defendant in effect makes a claim under the contract while not seeking to respect the forum clause which forms part of it. Such a case is not a conventional 'quasi-contractual' injunction because the ASI claimant cannot himself assert that the ASI defendant is bound by any derived contractual obligation: see *Raphael* at para 10.81.

58 The principle in these two cases was considered four years later by the English Court of Appeal in *Shipowner's Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS ("The Yusuf Cepnioglu")* [2016] 1 Lloyd's Rep 641 ("*The Yusuf Cepnioglu*"). The owner (a Turkish corporation) time chartered their vessel to a time charterer (another Turkish corporation). The charterparty contained a London arbitration

clause. The owner was entered with a P&I club ("Club") which provided an indemnity against third party claims, and the indemnity was conditional upon the owner having paid the claims against it (a "pay to be paid" clause). The Club cover provided for London arbitration in the case of any disputes between the owners and the Club. On 8 March 2014, the vessel grounded in Mykonos, and became a total loss. The charterer commenced arbitration against the owner in London in May 2014 pursuant to the arbitration clause in the charterparty. At about the same time, the charterer commenced court proceedings in Turkey to attach assets of the Club in Turkey under a direct action statute somewhat similar to the UK Third Parties (Rights Against Insurers) Act of 1930. It appeared that a "pay to be paid" clause was unenforceable as against a victim making a direct claim under the Turkish statute. The Club applied to the English Commercial Court for an ASI against the charterers continuing with the Turkish court proceedings.

59 Teare J granted the ASI, holding that applying English conflict of law principles, the charterer's right of action in Turkish law was to be characterised in substance as a claim to enforce a contract between the Club and its member; the Turkish proceedings were vexatious and oppressive in that the Club had a contractual right under the terms of its cover to be sued in arbitration in London; the effect of the Turkish proceedings was to deprive the Club of that right, and there was a real risk that the Club would be prevented from relying upon the 'pay to be paid' clause in its contract with its member. The time charterer appealed.

60 The Court of Appeal dismissed the appeal, agreeing with Teare J that a victim suing insurers under a direct action statute was in fact enforcing the member's contractual right to an indemnity from the Club. Once it was decided

that the charterers were exercising an essentially contractual right, Longmore LJ said, at [21]:

> …it must follow that the charterers are bound to accept that their claim is governed by English law and must be arbitrated in London. The charterers' proposed substantive Turkish proceedings would be a contravention of that obligation.

and at [22]:

> If the charterers were actually a party to a contract with the Club with its London arbitration clause but proposed to institute proceedings in a foreign court, there would be no doubt that they would be restrained from doing so by the grant of an injunction unless there was good reason not to do so: see *The Angelic Grace*.

Similarly, Moore-Bick LJ said, at [46]:

> It is now well-established that a person who becomes entitled to enforce a contractual obligation can do so only in accordance with its terms.

61 The facts of *The Yusuf Cepnioglu* are different from *The Sea Premium* and *The MD Gemini* in that the ASI claimant *was* a party to the contract but the ASI respondent was not. Once it was ascertained that the ASI respondent was suing the ASI claimant in a foreign jurisdiction pursuant to that contract, then, even though the ASI respondent was not a party to that contract, it was bound to observe the exclusive jurisdiction clause in the contract unless there was good reason not to. The ASI claimant was thus entitled to an ASI restraining the ASI respondent from bringing or continuing with proceedings in a foreign jurisdiction.

62 In a fourth case, *Dell Emerging Markets (EMEA) Ltd and another v IB Maroc.com SA* [2017] EWHC 2397 (Comm) ("*Dell Emerging Markets*"), Dell UK entered into an International Distributor Agreement ("the IDA") with IB

Maroc (a Moroccan corporation) pursuant to which IB Maroc was granted the right to market and distribute Dell products in Morocco. Clause 31 provided:

> Any dispute arising out of or in connection with this contract, including but not limited to any question regarding its existence formation performance interpretation validity or termination, shall be handled through the English courts.

The IDA referred to affiliates of Dell UK, of whom Dell Maroc was one. However such affiliates were not described as parties to the IDA and cl 13.4 provided that (i) it was not intended that any third party may enforce the IDA and (ii) accordingly the terms of the Contracts (Third Parties) Act 1999 did not apply to the IDA. IB Maroc entered into an agreement with Maroc Telecom SA ("Maroc Telecom") to provide it with an integrated cloud computing solution. To perform its obligations under that contract, IB Maroc needed to utilise the services of Dell UK under the IDA and a "Work Order", which incorporated the terms of the IDA, was agreed upon between them. Disputes arose between Maroc Telecom and IB Maroc. On 13 November 2015, IB Maroc sent a lawyer's demand to Dell Maroc claiming that it had contracted with Maroc Telecom to provide a Public Cloud and had in turn, entered into a subcontract with "Dell Morocco". It was further stated that Maroc Telecom had served a notice of default on IB Maroc and that unless Dell Maroc remedied the alleged defaults, IB Maroc would take legal action. On 3 December 2015, Dell Maroc replied to the lawyer and it appeared that the letter was written on the assumption that Dell Maroc was party to the IDA. It was later stated by Dell UK that due to an administrative error, the letter was sent on Dell Maroc's letterhead when it was being written on behalf of Dell UK. This was rectified in another letter with similar content on 9 December 2015. On 31 March 2017, IB Maroc issued proceedings before the Commercial Court in Casablanca against "Dell Company" with whom it alleged it had entered into an agreement; the agreement enclosed with the claim was the Work Order. It alleged that "Dell

Company" had breached the contract and sought compensation. On 2 May 2017, Dell UK wrote pointing out that Dell Maroc was not a party to the IDA or the Work Order and that pursuant to cl 31 of the IDA, any disputes were subject to the exclusive jurisdiction of the English Courts. Dell Maroc filed a Response Memorandum which said the claim was inadmissible because Dell Maroc was not a party to the IDA or Work Order. IB Maroc filed a rejoinder against both Dell UK and Dell Maroc, alleging that the claim against "Dell Company" was against both Dell UK as well as Dell Maroc, because Dell Maroc was jointly liable as it had been entrusted by Dell UK to complete the deal.

63 Dell UK and Dell Maroc applied for an ASI against IB Maroc proceeding with its action before the Casablanca courts. It was conceded that Dell UK was entitled to an ASI. The issue was Dell Maroc's application for an ASI. Teare J held that:

> (a) On a true construction of cl 31 (which referred to "any dispute arising out of or in connection with" the IDA) and its context within the IDA, (including cl 25 which contemplated Dell affiliates providing the products and cl 27 which provided a one year limitation for claims against Dell UK or its affiliates or licensors), it encompassed disputes between IB Maroc and Dell Maroc which arose in connection with the IDA. This was the "contractual" ground, *viz*, that cl 31 bound IB Maroc to bring its claim before the English Courts.
>
> (b) Dell Maroc was also entitled to its ASI on the "quasi-contractual" ground as demonstrated in *The Sea Premium* and the *obiter dictum* by Popplewell J in *The MD Gemini*. Teare J held, at [34], that "[t]he reason why the jurisdiction clause can be enforced by an injunction in those cases and in the present case is that it would be

inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract".

(c) After cautioning that cases like *The Yusuf Cepnioglu* and *The Hornbay* were cases where the ASI claimants were parties to the contract upon which the claims were based, if the approach of Longmore LJ in *The Yusuf Cepnioglu* was applicable to the present case, then the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept that its claim must be "handled through the English courts" as required by the contract in question; as with the case of Dell UK, there was no strong reason for not granting the ASI.

64 After hearing final submissions from counsel, I have come across further cases on *The Sea Premium* line of cases:

(a) Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Ltd [2018] EWHC 3009 (Comm) ("*Qingdao Shipping*"); and

(b) a very recent case, Clearlake Shipping Pte Ltd and another v Xiang Da Marine Pte Ltd [2019] EWHC 2284 ("*Clearlake Shipping*").

Further, that principle appears to have been applied in Hong Kong in *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian* [2019] HKCFI 482 ("*Dickson Valora*") at first instance by Godfrey Lam J on 20 February 2019.

65 In *Qingdao Shipping* (a decision of Bryan J on 25 September 2018), the owners, Qingdao Shipping, trip time chartered their vessel to charterers to carry

some 45,000 wet metric tons of nickel ore in bulk from Sulawesi, Indonesia for discharge at "Main Port of China Mainland". The receiver, Emori (China) Co Ltd ("Emori"), was the lawful holder of the bill of lading. The charterers defaulted in paying hire under the charter and Qingdao Shipping served a notice of lien over the cargo and any sub-freights which were owing or may become owing by receivers to the charterers up to the outstanding sum of US$648,605.61 due to Qingdao Shipping under the charter. This led to a settlement agreement entered into between Qingdao Shipping and Emori on 22 January 2014 (in a Chinese and an English version) under which:

(a) Emori agreed to pay Qingdao Shipping US$640,000 by 23 January 2014 in full and final settlement of Qingdao Shipping's claim for outstanding hire under the charterparty and their claim for port and agency fees; such payment would be made by Emori's authorised agent SDHX;

(b) Qingdao Shipping shall bring legal proceedings against the charterer for breach and in the event Qingdao Shipping succeeded in recovery of the outstanding hire from the charterers, then Qingdao Shipping shall repay Emori a sum up to the amount paid by Emori to Qingdao Shipping save that Qingdao Shipping shall be entitled to obtain recovery from the charterers in relation to their failure (to do certain matters) on redelivery in accordance with the charter; and

(c) the settlement agreement would be governed by English law and any "dispute of claim (whether contractual or otherwise) arising under, out of or in connection with the [settlement agreement] shall be submitted to London Arbitration".

One Mr Li Guolin signed the settlement agreement, under a power of attorney, on behalf of Emori. SDHX was not a party to the settlement agreement, but it did transfer the funds to Qingdao Shipping's account. On 27 January 2014, that agreement in both the Chinese and English versions was further signed and stamped by Emori and emailed to Qingdao Shipping, but it was otherwise in identical terms. Qingdao Shipping did commence proceedings against the charterer in arrest proceedings in South Korea but they were unable to recover the sums due to them.

66 In April 2017, over three years later, SDHX commenced proceedings against Qingdao Shipping in the Qingdao Shinan District Court China ("the Shinan Court") seeking repayment of the sum it had transferred to Qingdao Shipping. Qingdao Shipping was not formally served with the papers until July 2017. Qingdao Shipping applied to the English court for an ASI restraining SDHX from continuing proceedings before the Shinan Court. Despite steps having been taken to serve the papers, SDHX did not attend on the return date and was not represented.

67 Bryan J noted that from SDHX's statement of claim, SDHX did not dispute that:

(a) they paid the sum of US$640,000 to Qingdao Shipping;

(b) the settlement agreement provided for Emori to pay that sum through their authorised agent, SDHX; and

(c) SDHX was not a party to the settlement agreement;

but other than asserting that there was an alleged oral agreement, the precise basis of SDHX's claim was not entirely clear. The learned Judge went through

the statement of claim and noted that SDHX was alleging that a separate oral agreement was reached between SDHX and Qingdao Shipping which varied the settlement agreement. Under this purported oral agreement, SDHX was to "advance" the sum it paid on Qingdao Shipping's promise to recover the sum from the charterer and reimburse SDHX. Qingdao Shipping was in breach of this oral agreement in failing to pay SDHX the sums advanced and to compensate SDHX for the loss. The learned Judge found that the claim SDHX advanced in the Chinese proceedings was one for breach of contract and express reliance was placed on the settlement agreement, which was an agreement between the owner and Emori, in advancing its claim in the Shinan Court.

68 Bryan J acknowledged that the present case was an extension of *The Angelic Grace* in that the ASI was not sought against the original party to the settlement agreement but a third party to that agreement. However he held (at [31]) that:

> …a claimant abroad will be restrained by injunction from suing inconsistently with a forum clause contained in the contract which forms the basis of the claim. That is so even where the defendant himself denies that there is privity of contract and therefore denies that the foreign claimant is bound by the contract containing the Forum clause. In essence, he is not entitled to found a claim on rights arising out of a contract without also being bound by the forum provisions of that contract, …

citing *The Yusuf Cepnioglu*, *Dell Emerging Markets*, *The Sea Premium*, *The MD Gemini* and *Fair Wind Navigation v ACE Seguradora SA* [2017] EWHC 3352 (Comm) ("*Fair Wind Navigation*"). As there were no good reasons not to, the learned Judge granted Qingdao Shipping the ASI against SDHX continuing the proceedings in the Shinan Court in China. In doing so, the Judge held that there was no evidence before him of the oral agreement and there was no excessive delay which disentitled Qingdao Shipping to the relief prayed for.

69 In *Fair Wind Navigation*, following the collision of a vessel, the defendant insurers, ACE Seguradora SA, became subrogated to cargo interests. The first ASI claimant was a party to the relevant bills of lading, each of which included an English arbitration clause. The second ASI claimant was described by the defendant as the manager of the vessel. The defendant commenced an arbitration in London following the collision but also commenced litigation in Brazil against the second ASI claimant. That litigation prompted the ASI claimants to seek injunctive relief from the English court. Knowles J looked at the proceedings in Brazil and found that "on any analysis of the claim document in Brazil, what is sought to be pursued there by the defendant against [the second ASI claimant] […], is a claim in contract by reference to the bill of lading and one which treats those two parties as parties to that contract." In effect, "the defendant, Ace, seeks to sue the second [ASI] claimant under a contract but, whilst doing so, to omit that part of the contract that comprises an arbitration clause". Knowles J thus granted the claimants an ASI restraining the defendant from pursuing any claim *in contract* in Brazil.

70 Two things are of note in this case. First, Knowles J acknowledged the slightly "artificial world in a way" because the first point of the second ASI claimant was that it is not a party to the bill of lading. However, the learned Judge said that was not the key; the key is what the defendant was alleging against the second ASI claimant, and the defendant was alleging that it was a party to the contract. Secondly, during the course of submissions, the defendant evinced an intention to remove the contractual claim in the Brazil proceedings and to sue the second ASI claimant only in tort. However, the learned Judge said he was dealing with the case as it stood, not to the hypothetical future of a claim only in tort. He said he was careful to direct the ASI he granted only against the pursuit of a claim in contract in Brazil, but he gave the parties liberty to apply.

71 *Clearlake Shipping* is the latest English case on *The Sea Premium* line of cases and HH Andrew Burrows QC (sitting as a Judge of the High Court) gave judgment on 22 August 2019. A disponent owner, Xiang Da, voyage chartered its vessel to Clearlake (the "Clearlake charter"), who in turn, sub-voyage chartered the vessel to Gunvor (the "Gunvor sub-charter"). The Clearlake charter provided for English law as the governing law, LMAA London arbitration for claims less than US$50,000 and exclusive English High Court jurisdiction for claims above that sum. The Gunvor sub-charter contained a similar clause. Under a sale contract, Gunvor sold some 40,000 mt of light cycle oil to China-Base, 'cif' Nansha, China and nominated the vessel to perform the contract. Payment under the sale contract was by irrevocable letter of credit. On China-Base's application, two irrevocable letters of credit were opened in favour of Gunvor, one for US$7,600,000 in respect of 16,000 mt of light cycle oil and the other for US$11,400,000 in respect of 24,000 mt of light cycle oil. It was decided to split the original one bill of lading into two bills of lading for the cargo to be sold in China. Clearlake requested the brokers to split the bill of lading into two bills of lading, a requirement "due to receiver's request", and for re-documentation for the two replacement (switch) bills of lading and cargo manifests. This request was passed on Xiang Da who required Clearlake to provide letters of indemnity in terms of Xiang Da's draft (for comingling/blending, inter-tank transfers and re-documentation). Three letters of indemnity were provided and all three had a final clause stating that the indemnity would be governed by English law and each and every person liable under the indemnity shall submit to the jurisdiction of the English High Court. The master of the vessel then issued two switch bills of lading and cargo manifests and sent copies to the brokers who forwarded them to China-Base. The switch bills of lading stated that the relevant cargoes of 16,000 mt and 23,949.295 mt were shipped at "Subic Bay Philippines" and that "all the terms

and exceptions contained in [the] Charter are herewith incorporated." Upon the vessel's arrival and discharge of the cargo at Nansha, a portion of the oil was detained by the Nansha customs authorities on the grounds that contrary to what was stated in the shipping documents, the cargo did not originate from the port of Subic Bay.

72 On 1 April 2017, China-Base brought proceedings in the High Court in Singapore against Xiang Da seeking damages (including $16,131,644.41 comprising most of the purchase price paid to Gunvor), primarily for the alleged fraudulent or negligent misrepresentations in the switch bills of lading and cargo manifests because the cargo was not loaded at Subic Bay. Xiang Da mounted a jurisdiction challenge on the English exclusive jurisdiction clause in the charterparty, the terms of which had been incorporated into the bills of lading. This jurisdictional challenge failed before the Assistant Registrar apparently on the basis that there was no bill of lading contract between China-Base and Xiang Da and there was therefore no jurisdiction clause. Xiang Da filed an appeal but subsequently withdrew the same and filed a defence on 16 April 2018, thereby submitting to the jurisdiction of the Singapore court. On 8 January 2019, Xiang Da gave notice of its intention to bring third party proceedings against both Clearlake and Gunvor, seeking an indemnity or contribution from Clearlake and/or Gunvor in respect of any liability to pay damages or other loss it might suffer by reason of China-Base's claims against Xiang Da. The basis of the third party claim was fraudulent misrepresentation and/or negligent misrepresentation and/or breach of duty and/or breach of contract. The alleged misrepresentation was the statement "due to receiver's request" made through the brokers. There was an additional claim against Clearlake under a letter of indemnity (one of the three letters of indemnity given).

73 At the "without notice" (*ex parte*) stage, Bryan J granted Clearlake and Gunvor ASIs on the following bases:

(a) Clearlake – Xiang Da's claims for breach of the charterparty and tortious misrepresentations fell within the ambit of the exclusive jurisdiction clause and Xiang Da was in breach of that clause in bringing proceedings in Singapore and there were no strong reasons not to grant the ASI; the same applied to Xiang Da's claims under the letter of indemnity; and

(b) Gunvor – Gunvor was entitled to an ASI on a "quasi-contractual basis". In any event, Gunvor should be entitled to an ASI on the basis of vexation or oppression because England was the most appropriate forum for the resolution of the parties' dispute and, in all the circumstances, including having regard to comity, the ends of justice required the granting of the ASI.

74 On the "return day", Xiang Da did not take the point that the ASIs should not have been granted, but had instead circulated draft proposed amendments to the Singapore third party proceedings which made much of Bryan J's reasoning no longer applicable and the ASIs could only continue with fundamental amendments. These amendments made clear that the third party claims:

(a) as against Clearlake, were solely based on the letter of indemnity, Xiang Da accepted that any claims under the Clearlake charterparty were subject to the English jurisdiction clause and only wished to pursue those claims which are not subject to the charterparty jurisdiction clause; and

(b) as against Gunvor, were solely brought in tort for fraudulent and/or negligent misrepresentation (or other breach in tort); any possible contractual claim against Guvnor was abandoned.

Xiang Da reinforced this by an undertaking to the Court that it would not pursue any claims against Clearlake or Gunvor before the Singapore courts save for those set out in the draft amended third party proceedings.

75 In his review of the law on ASIs, HH Burrows QC noted that Gunvor no longer pursued its right to an ASI on the "quasi-contractual" ground. Other than noting the unfortunate use of "quasi-contractual" terminology, as it historically caused well-known confusion in relation to the law of unjust enrichment, the learned Judge seemed to have accepted that "[t]his ground for an anti-suit injunction appears to apply where there are foreign proceedings for breach of contract, there is an English jurisdiction clause in that contract, and the party seeking the anti-suit injunction denies that it is a party to that contract", citing *The Sea Premium* line of cases.

76 HH Burrows QC held that first, Clearlake was entitled to an ASI to prevent Xiang Da from proceeding with its claims under the letter of indemnity in Singapore, and there were no strong reasons not to do so. Secondly, Gunvor (see below) was also entitled to an ASI to prevent Xiang Da's tortious misrepresentation claims against Gunvor from proceeding in Singapore and there was very good reason, in avoiding forum-fragmentation on the same issues, to have all the third party proceedings by Xiang Da against Clearlake and Gunvor heard in the same jurisdiction, *ie*, England.

77 HH Burrows QC also held that Gunvor was entitled to an ASI to prevent Xiang Da from bringing its tortious misrepresentation claims against Gunvor in

Singapore. Although there was no binding jurisdiction clause between Gunvor and Xiang Da, the court exercised its discretion in granting the ASI to Gunvor on the grounds that it would be vexatious and oppressive for the tort claim to be brought in Singapore. This was because:

(a) There was an exclusive jurisdiction clause in the Clearlake charter, the Gunvor sub-charter and in the switch bills of lading; this indicated that although Xiang Da, Clearlake and Gunvor were all incorporated in Singapore, England was, in the required sense, the natural forum for the third party claim. HH Burrows QC agreed with Bryan J that England was the most appropriate forum for the resolution of the parties' dispute.

(b) Xiang Da had manipulated its third party claims to avoid being caught by the exclusive jurisdiction clause in the Clearlake charter. It was Clearlake, through the broker, and not Gunvor, that dealt with Xiang Da. The email with the alleged misrepresentation – "due to receiver's request" – was sent by Clearlake, not Gunvor, to Xiang Da through the broker. The most obvious tortious misrepresentation claim open to Xiang Da, was against Clearlake, not Gunvor, and it appeared that the claim against Gunvor rested on the misrepresentation passed on by Clearlake to Xiang Da.

(c) If Gunvor was held liable for tortious misrepresentation to Xiang Da, it was hard to see why Clearlake would not also be so liable. Yet such a claim would have fallen within the exclusive jurisdiction clause in the Clearlake charter. Had such a claim been brought against Clearlake in England (as required by the exclusive jurisdiction clause in the Clearlake charter) it would plainly have constituted unacceptable forum-fragmentation on the same issues for the misrepresentation claim

> against Gunvor to have been heard in Singapore. In HH Burrows QC's view, the bringing of the tortious misrepresentation solely against Gunvor and not Clearlake was a procedural manoeuvre designed to evade the exclusive jurisdiction clause.

HH Burrows QC also articulated the issue of whether Clearlake was entitled to an ASI to prevent Xiang Da's tortious misrepresentation claims against Gunvor proceedings in Singapore. However, he did not find it necessary to decide this issue (which involved very difficult issues of construction) in view of his decision above.

78 The reasoning of *The Sea Premium* line of cases was applied in Hong Kong on 20 February 2019 in the case of *Dickson Valora*. In that case, overseas investors agreed with F, a Mainland Chinese, to develop a property project in Jiangsu, Mainland China. Through their respective corporate vehicles, Moravia CV, a Netherlands corporation ("MCo") owned by the overseas investors, and Dickson Holdings Enterprise Co Ltd ("DHE"), a Hong Kong corporation owned by F, the parties set up a joint venture company in Hong Kong, Dickson Valora Group Holdings Co Ltd, ("JVCo") with MCo and DHE each holding 500,000 shares in JVCo. JVCo had a wholly owned subsidiary (the "Subsidiary") that was to acquire land for the project. MCo, DHE and JVCo entered into a shareholders agreement on 24 December 2010. On 21 January 2011, the three parties signed a supplementary agreement under which a success fee was payable to DHE subject to certain conditions. Three versions of an addendum were subsequently signed in December 2011 ("the Addendum"), under which two of MCo's investors and F were entitled to success fees subject to certain conditions, although none of these individuals were a party or signatory to the Addendum. The two sides then fell out as the joint venture faced challenges, especially on funding. Although F was not a party to the shareholders agreement

or the Addendum, he commenced an action on 6 June 2018 in the Shenzhen Qianhai Cooperation Zone People's Court ("Qianhai Court") against JVCo and the Subsidiary pursuant to the Addendum, claiming a contractual right to the success fee. The Qianhai Court granted F a freezing order on 22 August 2018 against JVCo and the Subsidiary ("the Companies") and an execution order on 27 August 2018. The effect was to impound over 40 apartments held by the Subsidiary for 3 years, and the assets of the JVCo and the Subsidiary were frozen. The Companies lodged a challenge to the jurisdiction of the Qianhai Court on the basis of the arbitration clause, but the challenge was dismissed. The Companies appealed that decision of the Qianhai Court and also applied in Hong Kong for an ASI to restrain F from continuing the Qianhai Court proceedings in breach of the arbitration clause.

79 Godfrey Lam J granted the ASI and held that:

(a) The Addendum was an appendix or subsidiary addition to the supplementary agreement, which was expressly intended to be a "complement" to the shareholders' agreement, and both were subject to the arbitration clause in the shareholders' agreement. All three documents were to be read together as a whole and, given the commercial and practical realities, the provisions on general matters such as choice of law or dispute resolution in the shareholders agreement were intended to govern the supplementary agreement and the Addendum.

(b) Assuming that F had a *prima facie* cause of action for a success fee derived from the supplementary agreement and the Addendum, a non-party to a contract who became entitled to enforce an obligation which was subject to an arbitration clause must do so by arbitration

according to the contract, and the basis for the court's intervention by granting an ASI to restrain such a claimant from enforcing a contractual obligation by foreign proceedings instead of arbitration was the same as a claimant who was an original party to the arbitration agreement (applying *The Angelic Grace*, *The Jay Bola* and *The Yusuf Cepnioglu*).

(c) Neither an assignee of contractual rights nor a subrogee to such rights became a party to the contract in the full sense, but they could be restrained by equity from acting inconsistently with the conditions integral to their rights, unless there was strong reason for not doing so.

(d) This approach applied equally to F in asserting contractual rights against JVCo and the Subsidiary under the Addendum, which were, in turn, subject to the arbitration clause, whether he did so at common law or under Mainland law (applying *The Angelic Grace*, *The Sea Premium*, *The MD Gemini*, *Dell Emerging Markets*, *Fair Wind Navigation* and Thomas Raphael, *The Anti-suit Injunction* (Oxford University Press, 2008) ("*Raphael 2008*") at para 10.23).

(e) It was unconscionable for F to claim a benefit under the contract in a different forum without recognising the conditions to which it was subject.

(f) It was not abusive for the Companies to apply for the injunction after failing the jurisdictional challenge at first instance and at the same time as an appeal against that decision was lodged in the Qianhai Court. The importance of comity considerations was "reduced" where, as here, an ASI was sought so that the dispute could be dealt with by the contractually stipulated mechanism. This reflected the unambiguous policy of Hong Kong courts in support of arbitration.

80 Some of my formulation of principles and issues below borrow heavily from the very instructive text that I have referred to above – *Raphael*. There has been a large increase in English case law in this area between 2008 and 2019; this is evident from a comparison of the text and footnotes in the two editions of *Raphael 2008* and *Raphael.* There are also differences in English case law due to the United Kingdom being part of the European Union and European legislation. Fortunately, some of these difficulties and conflicts in the judgments do not apply to the fact situation of this case.

81 I find *The Sea Premium* line of cases, *viz*, *The Sea Premium*, *The MD Gemini*, the *dicta* of Popplewell J in *The Yusuf Cepnioglu* and *Dell Emerging Markets*, persuasive and I find them applicable as part of Singapore law. This principle enables an ASI claimant, although claiming not to be a party to the contract which the ASI respondent sues upon in a foreign jurisdiction (which is inconsistent with an exclusive forum clause (or arbitration agreement) to which the ASI respondent's claim would be inherently subject under the contract), to be granted an ASI restraining the ASI respondent from bringing or continuing proceedings abroad (which is inconsistent with the exclusive forum clause to which his claims would be inherently subject if any contractual relationship subsists). The grant of such an ASI is an exercise of the court's equitable jurisdiction and is subject to the principles set out above at [20] and [21]. As noted at [54], the foreign proceedings must be in breach of the exclusive jurisdiction clause, the ASI claimant must be entitled to enforce the clause, the clause must be binding and not invalid, and the claim in the foreign proceedings must fall within its terms. The English Court in *Clearlake Shipping* pushed the envelope further by taking into consideration what the court viewed as deliberate and unacceptable forum fragmentation in bringing separate claims in contract and tort in different jurisdictions. I do not need to decide on this point but I will say that it echoes the bold approach of our Court of Appeal in

Tomolugen and can be well justified in some circumstances under the rubric as being required by the ends of justice.

82 I note that this is a complex area of law that is developing and the growing number of cases show that the boundaries of the effect of exclusive forum clauses (whether exclusive jurisdiction or arbitration clauses) on third parties are being tested, see *Raphael* at para 7.28. The learned author correctly goes on to state that the key questions are:

(a) first, whether a non-party can enforce the exclusive forum/arbitration clause;

(b) secondly, when a non-party can be bound by the exclusive forum/arbitration clause; and

(c) thirdly, when the contractual effect of the clause covers litigation with respect to non-parties.

Decisions like *The Yusuf Cepnioglu* are also not without difficulty or controversy, especially where characterisation of the foreign proceedings are important. Are they characterised by foreign law or by English law? In *The Yusuf Cepnioglu,* Turkish legislation not only allowed cargo interests a direct cause of action against the P&I club in Turkey but also rendered the "pay to be paid" clause in the cover unenforceable against the "victim" who suffered the loss: see [58]. Fortunately, this difficulty of characterisation of third-party rights under foreign law do not arise in this case (where they do, there are conflicting cases including *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] EWHC 455 (Comm), *London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain and another ("The Prestige") (No 2)* [2015] EWCA Civ 333, *West Tankers Inc v Ras*

Riunione Adriatica di Sicurta SpA and another ("The Front Comor") [2005] EWHC 454 (Comm) and *The Yusuf Cepniolglu*).

83 *Raphael* correctly, in my view, points out that the juridical underpinnings of this jurisdiction are underdeveloped (at para 10.85) and states there are three possibilities:

(a) first, it is arguable in some cases that, for the purposes of assessing whether an injunction should be granted, the ASI respondent should be estopped from denying the existence of the contract under which his substantive claims are made, even though the ASI claimant denies the existence of the contract (see *The Sea Premium*);

(b) secondly, it would be possible to postulate an equitable obligation on the ASI respondent not to bring a claim in a forum inconsistent with that agreed under the contract which he alleges exists, or which is the necessary condition of his claims (see *The Sea Premium*, where Steel J regarded the ASI respondent as "bound" by the clause); and

(c) thirdly, it could be said that it is vexatious and oppressive to bring an internally inconsistent claim which does not respect the exclusive forum clause which would be the condition of any coherent claim (see *The MD Gemini* and *Dell Emerging Markets*, Popplewell J's *obiter* in *The MD Gemini* and *Clearlake Shipping* at [18(ii)]).

In *Dell Emerging Markets*, Teare J used the language of both "inequitable" and "vexatious and oppressive" and made reference to the ASI respondent being "bound". I find all three bases capable of grounding an ASI depending on the

particular facts before the court and applying the principles set out at [20] and [21] above.

84 I have alluded above to the difficulties where an ASI respondent brings his claim in the foreign jurisdiction solely in tort and undertakes to the court of the exclusive forum clause not to bring any claims in contract in the foreign jurisdiction. In *The Angelic Grace*, both at first instance and on appeal, the English courts held that the contractual and tortious claims all arose from the very same facts, which in turn arose directly from performance of the charterparty and therefore fell within the Centrocon London arbitration clause: "All disputes from time to time arising out of this contract shall … be referred to the arbitration of two Arbitrators carrying on business in London…". I have already noted the English Court's approach in *Qingdao Shipping* above. However, these difficulties do not arise in this case as the claim brought by the Defendant in Dubai is clearly brought only for breach of the CUA.

Conclusion

85 For the reasons set out above, I grant the ASI prayed for by the Plaintiff. I have been told the Sharjah and the arbitral proceedings are on hold pending my decision. I make the following further orders: -

(a) Security that has been provided by Rajah & Tann in accordance with the Order of Court HC/ORC 743/2018 is to remain until further order from the arbitral tribunal or the court, for which the parties have liberty to apply.

(b) The vessel has been released so no orders in relation to it are required.

(c) Plaintiff, and the Defendant, to proceed with the arbitration with all due despatch.

(d) Nothing I say in this judgment is binding on the arbitral tribunal which shall be free to decide on the issue of jurisdiction or any other issues placed before it by the parties.

(e) There will be liberty to apply to me generally, including but not limited to possible further directions depending on the outcome of the arbitral proceedings.

(f) Costs should follow the event and are to be agreed if possible, and if not, I will hear the parties on costs. Each party is to file skeletal submissions thereon, including quantum, with a maximum page limit of 8 pages, at least 2 clear days before the next hearing.

Quentin Loh
Judge

Toh Kian Sing SC, Vellayappan Balasubramaniyam, Jonathan Tan and Wu Junneng (Rajah & Tann LLP) for the plaintiff;
Yap Yin Soon, Dorcas Seah Yi Hui and Vivian Ang (Allen & Gledhill LLP) for the defendant.