

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2021] SGHC 124

Originating Summons No 1543 of 2019 (Summons No 495 of 2020)

Between

National Oilwell Varco Norway AS
(formerly known as Hydralift AS)

... Plaintiff

And

Keppel FELS Ltd (formerly known as
Far East Levingston Shipbuilding Ltd)

... Defendant

GROUND OF DECISION

[Arbitration] — [Enforcement] — [Setting aside leave to enforce] — [Where non-existent entity named as party to arbitration]

[Arbitration] — [Conduct of arbitration] — [Estoppel]

[Civil Procedure] — [*Ex parte* applications] — [Duty of full and frank disclosure]

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**National Oilwell Varco Norway AS (formerly known
as Hydralift AS)**

v

**Keppel FELS Ltd (formerly known as Far East
Levingston Shipbuilding Ltd)**

[2021] SGHC 124

General Division of the High Court — Originating Summons No 1543 of 2019
(Summons No 495 of 2020)

Vinodh Coomaraswamy J

29 June, 22, 30 September 2020

11 June 2021

Vinodh Coomaraswamy J:

Factual background

1 The application before me involves three companies: the plaintiff, the defendant and a company known as A/S Hydralift (“Hydralift”). The plaintiff and Hydralift are companies incorporated in Norway. The defendant is a company incorporated in Singapore.

2 By this application, the defendant attempts to set aside leave which the plaintiff secured under s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“the Act”) to enforce an award issued in favour of Hydralift against the defendant.

3 The defendant submits that the plaintiff’s leave should be set aside on, amongst others, two independent grounds: (a) the plaintiff cannot enforce an award which the tribunal intended to and did issue in favour of Hydralift; and (b) the arbitration and the award are a nullity because Hydralift ceased to exist in 2004, well before the defendant commenced the arbitration in 2007.¹

4 The plaintiff rejects both of these grounds, arguing that: (a) Hydralift’s name was used in the arbitration and is used in the award as a misnomer for the plaintiff; (b) the plaintiff is entitled to enforce the award against the defendant even though the award is in favour of Hydralift; (c) Hydralift transferred all of its assets, rights and obligations to the plaintiff as a result of two mergers in 2004 (see [8] below); and (d) the plaintiff was entitled to conduct the arbitration in the name of Hydralift.²

5 I have allowed the defendant’s application and set aside the plaintiff’s leave. The plaintiff has appealed against my decision. I now set out the grounds for my decision. I start by tracing the events from 1996 to 2020.

The Contract, the arbitration and the award

6 In 1996, the defendant entered into a contract with Hydralift (“the Contract”). The Contract is governed by Singapore law and contains an agreement for disputes to be resolved by arbitration in Singapore.³

¹ Joint Bundle of Documents (“JBOD”) vol 1 at p 22, paras 50(d) and 50(f).

² JBOD vol 1 at pp 22–23, paras 50(e) and 50(g).

³ JBOD vol 2 at p 822, cl 26.

7 A dispute under the Contract arose between the defendant and Hydralift in 1999.⁴ They attempted in vain to resolve the dispute until 2007.

Hydralift ceased to exist in 2004

8 While these attempts were going on, Hydralift was struck off the Norwegian companies register in 2004 as a part of the following series of corporate events:

(a) In 2002, Hydralift became a wholly owned subsidiary of a Norwegian company called National Oilwell-Hydralift AS (“NOH”).

(b) On 6 October 2004, Hydralift merged with NOH.⁵

(c) Also on 6 October 2004, upon the merger with NOH taking effect, Hydralift was struck off the Norwegian companies register and ceased to exist.

(d) On 15 October 2004, NOH merged with National Oilwell Norway AS. “National Oilwell Norway AS” is the former name of the plaintiff.

(e) In 2010, the plaintiff changed its name from National Oilwell Norway AS to National Oilwell Varco Norway AS.⁶ “National Oilwell Varco Norway AS” is the current name of the plaintiff.

9 The defendant accepts that it was aware that Hydralift had been acquired in or around 2002, without knowing the details of the acquisition. But the

⁴ JBOD vol 1 at p 11, para 21.

⁵ JBOD vol 1 at pp 7–8, para 8.

⁶ JBOD vol 1 at p 8, para 9.

defendant denies that it knew that Hydralift had merged with the plaintiff via NOH in 2004 or that Hydralift had ceased to exist as a result of the merger. The defendant's case is that it learned only in 2019 that Hydralift had ceased to exist. That was when the plaintiff asked the defendant to satisfy the award by making payment to a bank account in the plaintiff's name rather than in Hydralift's name.⁷

10 The plaintiff does not challenge this denial by the defendant directly. The plaintiff accepts that it did not disclose to the defendant that Hydralift had merged with the plaintiff and ceased to exist.⁸ The plaintiff only goes so far as to assert that it believed that the defendant was aware of the merger.⁹

The arbitration

11 In 2007, the defendant commenced the arbitration against Hydralift.¹⁰ The defendant claimed the equivalent of \$5.5m in damages against Hydralift for breach of contract.¹¹ The plaintiff instructed solicitors to defend the arbitration. In the name of Hydralift, the plaintiff defended the claim against Hydralift and counterclaimed in the name of Hydralift the equivalent of \$1.2m in damages against the defendant for breach of contract.¹²

⁷ Defendant's Written Submissions ("DWS") dated 20 March 2020 at para 21.

⁸ DWS at para 49(a); JBOD vol 3 at p 1796, para 6.

⁹ Plaintiff's Written Submissions ("PWS") dated 20 March 2020 at para 81.

¹⁰ JBOD vol 2 at pp 839–840.

¹¹ DWS at para 12.

¹² DWS at para 13.

12 A tribunal comprising three arbitrators was constituted in 2008. The evidential hearing took place in November and December 2018.¹³ The tribunal issued its final award in September 2019. The award dismissed the claim and allowed the counterclaim. The defendant's liability under the award is the equivalent of \$0.7m in damages and \$3.1m in costs, plus interest on both.¹⁴

13 The plaintiff commenced these proceedings in December 2019 under s 19 of the Act read with O 69A r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). By these proceedings, the defendant sought the court's leave to enforce the award against the defendant in the same manner as a judgment. The plaintiff secured leave to enforce the award against the defendant in January 2020.

14 The defendant has not satisfied the award. It did not apply to have the award set aside. Instead, as is its prerogative, the defendant waited for the plaintiff to secure leave to enforce the award and now applies to set that leave aside.

The proper approach on this application

15 The ultimate issue on this application is whether the plaintiff is entitled to enforce the award against the defendant under s 19 of the Act. The parties, however, adopt diametrically opposed starting points and advocate diametrically opposed approaches to this issue.

¹³ DWS at para 20.

¹⁴ JBOD vol 1 at p 20, para 47.

16 The defendant takes the award¹⁵ as its starting point and moves backwards in time through the arbitration and the mergers to the Contract and the arbitration agreement. The plaintiff, by contrast, takes the arbitration agreement and the Contract as its starting point and moves forward in time through the mergers and the arbitration to the award.¹⁶

17 I consider the defendant’s starting point and approach to be correct. This is not an application to set the award aside under either s 24(b) of the Act or Art 34 of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”). If it were, I would agree with the plaintiff that the parties’ arbitration agreement is the natural starting point. This is instead an application to set aside the plaintiff’s leave to enforce the award. This application therefore springs from the award, not from the parties’ arbitration agreement or from events during the arbitration. All of that is now water under the bridge. The correct starting point for determining whether the plaintiff can enforce this award must be the award itself.

18 I therefore adopt the defendant’s starting point and approach.

The questions to be answered

19 The defendant’s approach poses the following five questions for me to answer. The first four are substantive questions arising from the award. The fifth

¹⁵ Defendant’s Decision Tree in letter from WongPartnership LLP dated 25 September 2020.

¹⁶ Plaintiff’s List of Issues (“PLI”) dated 25 September 2020.

is a procedural question arising from the plaintiff's conduct in the *ex parte* application for leave to enforce the award. The five questions are:

- (a) Did the tribunal issue the award in favour of Hydralift or in favour of the plaintiff?
- (b) Is the use of Hydralift's name for the respondent in the arbitration merely a mistake as to the name of the correct respondent, *ie* the plaintiff?
- (c) Is the plaintiff estopped by representations that it made to the defendant in the arbitration and in certain related litigation (see [125]–[126] below) from denying that the respondent in the arbitration is Hydralift?
- (d) Does the Contract prohibit the 2004 mergers from transferring Hydralift's rights under the Contract to the plaintiff, including its rights under the arbitration agreement in the Contract?
- (e) Did the plaintiff make full and frank disclosure to the court when it applied *ex parte* for leave to enforce the award?

20 Before I answer these five questions, I make three observations on the expert evidence before me.

The expert evidence on Norwegian law

21 The effect of a merger is a matter relating to the status of the companies involved. Hydralift, NOH and the plaintiff are all companies incorporated in Norway. The effect of the 2004 mergers is therefore governed by Norwegian

law (*JX Holdings Inc and another v Singapore Airlines Ltd* [2016] 5 SLR 988 (“*JX Holdings*”) at [21]–[22] and [43(b)]–[43(c)]).

22 Both parties have adduced substantial expert evidence on the applicable Norwegian law. The plaintiff’s expert is Mr Robert Sveen. The defendant’s expert is Mr Olav Fredrik Perland.

23 I make the following three observations about the expert evidence on Norwegian law before me.

24 First, it is undisputed that Hydralift ceased to exist as a legal person from the moment it was struck off the Norwegian companies register as a result of its merger with NOH taking effect on 6 October 2004.

25 Second, there is no evidence that the effect of a merger under Norwegian law is that the transferee acquires the *name* of the transferor. In other words, there is no evidence that Norwegian law deems any use of Hydralift’s name on and after 6 October 2004 to be a reference to NOH and, on and after 15 October 2004, to be a reference to the plaintiff (*cf* the effect of a change of name under s 28(6) of our Companies Act (Cap 50, 2006 Rev Ed)).

26 Mr Sveen places great emphasis on the principle of “continuity” under Norwegian company law (see [158(b)] below).¹⁷ But he does not go so far as to say that the principle of continuity means that, once a merger takes effect under Norwegian law and the transferor ceases to exist, the transferor’s *name* is deemed by Norwegian law to point to the transferee. As soon as Hydralift ceased to exist, therefore, its name no longer pointed to a legal person.

¹⁷ JBOD vol 3 at p 1731, paras 23–24.

27 Third, on the evidence before me, the only name by which the plaintiff has ever been “formerly known” is the name “National Oilwell Norway AS” (see [8(d)]–[8(e)] above). Although the plaintiff merged with NOH, the plaintiff was never “formerly known” by NOH’s name. And although NOH had merged with Hydralift a few days earlier, the plaintiff was never “formerly known” by Hydralift’s name.

28 It is therefore factually wrong for the plaintiff to describe itself, as it does in the title to these proceedings, as being “formerly known as Hydralift AS”. Hydralift never changed its name to “National Oilwell Varco Norway AS”, whether directly or by any intermediate steps. It is, of course, true that the plaintiff absorbed the entire business of Hydralift via NOH. But that is not at all the same thing as the plaintiff having been formerly known by Hydralift’s name.

29 I now turn to consider the five questions which I must answer to determine the ultimate issue on this application (see [19] above).

Did the tribunal issue the award in favour of Hydralift or the plaintiff?

30 The first question the defendant poses is whether the tribunal issued the award in favour of Hydralift or in favour of the plaintiff. I find that the tribunal intended to and did issue its award in favour of Hydralift and not in favour of the plaintiff. I make that finding for two reasons.

31 First, the award describes the respondent in the arbitration as the legal person who entered into the Contract with the defendant in 1996.¹⁸ As a historical fact, it was Hydralift who entered into the Contract with the defendant

¹⁸ JBOD vol 1 at p 38, para 13.

in 1996.¹⁹ The plaintiff did not. The plaintiff may have acquired Hydralift's rights and obligations under the Contract by reason of the 2004 mergers. But the mergers do not change the historical facts of 1996 or operate to bring the plaintiff within this description.

32 Second, the award describes the respondent in the arbitration as being a legal person *other than* the plaintiff. The award refers to the respondent as simply "the Respondents". And the award refers to the plaintiff by its full name, "National Oilwell Varco Norway AS". The award therefore uses a different term for each, thereby indicating that it sees the plaintiff and Hydralift as two different legal persons. This is also evident from the way the award describes Hydralift's sole factual witness in the arbitration, one Mr Frode Jensen:

B. The Respondents' Evidence

133 As stated earlier at [87], Jensen was the only factual witness of the Respondents. ... Jensen rose through the ranks and is now the managing-director of the *Respondents' parent company* National Oilwell Varco Norway AS.

[emphasis added]

33 This is the only capacity in which the award refers to the plaintiff: as the respondent's parent company. The award does not refer to the plaintiff as the legal person who subsequently acquired all of Hydralift's rights and obligations under the Contract following the 2004 mergers. That is for the simple reason that the plaintiff never told the tribunal about the 2004 mergers.

34 Paragraph 133 of the award (see [32] above), coupled with the award's description of the plaintiff only as the respondent's parent company, establishes that the award rests on the following premises: (a) that Hydralift is the

¹⁹ JBOD vol 2 at pp 805 and 825.

respondent in the arbitration; (b) that Hydralift is still in existence; and (c) that Hydralift is a subsidiary of the plaintiff. All of this necessarily implies that the award: (a) treats Hydralift as a different legal person from the plaintiff; and (b) does not consider the respondent in the arbitration to be the plaintiff. The award does not rest on either of the following premises: (a) that “National Oilwell Varco Norway AS” and “Hydralift AS” are alternative names for the same legal person; or (b) that the plaintiff is a transferee of Hydralift’s rights and obligations under the Contract.

35 For both of these reasons, I find that the tribunal intended to and did issue the award in favour of Hydralift, and not in favour of the plaintiff. The question which follows from this finding is whether the plaintiff is entitled to enforce an award which the tribunal intended to issue and did issue in favour of another legal person. The fact that Hydralift did not exist as a legal person even when the defendant commenced the arbitration is not material to this question.

36 Answering this question requires me to consider the proper approach to enforcement under s 19 of the Act.

The mechanical approach to enforcement

37 As it stood at the time of the plaintiff’s application, s 19 of the Act read as follows:

Enforcement of awards

19. An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

The procedure for invoking s 19 of the Act is set out in O 69A r 6 of the Rules of Court. Order 69A r 6(1)(b) defines the party seeking to enforce an award as “the creditor” and the person against whom it is sought to enforce an award as “the debtor”. I adopt the same terms in this judgment.

38 Enforcement under s 19 is a two-step process. In the first step, the court grants the creditor leave to enforce the award. In the second step, the court enters judgment against the debtor on the award. It is only when judgment is entered that the award is formally put on the same legal footing as a judgment of the court.

39 The critical point about s 19 is that it does not empower an enforcing court to vary or deviate from the dispositive terms of the award at either of these two steps. Section 19 empowers the court to grant a creditor leave to enforce the award against a debtor only “in the same manner as a judgment or an order *to the same effect*” [emphasis added]. Further, s 19 empowers the court to enter judgment against the debtor only “*in terms of the award*” [emphasis added].

40 Such a mechanical approach to enforcement under s 19 may appear unduly narrow and technical. But a mechanical approach is, in my view, dictated by the policy imperative of party autonomy. I say that for two reasons. First, parties who choose arbitration ought not to have any more or any fewer rights or obligations as against each other than those which have been determined in the award produced by their reference to arbitration. Second, no legal person can be held liable on an award unless it is a contracting party to the arbitration agreement invoked in the reference which has produced the award.

41 Further, it is also my view that the mechanical approach is dictated by the policy imperative of minimal curial intervention. I say that also for two

reasons. First, it is wrong in principle for an enforcing court to do anything which might, even indirectly or unintentionally, alter the substance of the parties' rights and obligations as determined in the award. Second, it is also wrong in principle for an enforcing court to go behind the dispositive terms of an award in order to analyse the tribunal's reasons for arriving at those terms, even if the sole reason for doing so is simply to ensure that a proposed deviation from the dispositive terms of the award makes no change of substance to the parties' rights and obligations as determined in the award. Both of these things would amount to a court intervening at the enforcement stage contrary to the spirit of Art 5 of the Model Law.

42 The only way to advance both of these policy imperatives is for the court to grant leave to enforce an award and to enter judgment thereafter in terms which mirror, precisely and mechanically, the dispositive terms of the award. That is why s 19 of the Act gives an enforcing court no power to vary or deviate from the dispositive terms of an award, however well-intentioned the desire to do so might be.

43 This is the position in English law. Section 101 of the English Arbitration Act 1996 (c 23) (UK) ("the English Act") is *in pari materia* with s 19 of the Act. Section 101 "makes it clear that the enforcement process is a mechanistic one, and that the court may simply give a judgment which implements the award itself": Robert Merkin, *Arbitration Law* (Informa UK, March 2021 release) at para 19.48. Thus, for example, an English court has no power to give leave to enforce an award in favour of or against anyone other than the parties to the arbitration (Merkin at para 19.48):

... It follows that the award cannot be enforced on terms not specified in the award. ... In particular, an award can only be enforced against a losing party in the arbitration. The party successful in the arbitration is not, therefore, entitled to seek

enforcement of the award against another person who is alleged in the enforcement proceedings to be the principal of the losing party in the arbitration. ...

44 The authority which Merkin cites for the mechanical approach is the decision at first instance of Gross J (as he then was) in *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2002] EWHC 2120 (Comm) (“*Norsk Hydro*”).²⁰ In *Norsk Hydro*, a tribunal issued an award against a number of legal persons including a single legal person named in the arbitration and in the award as “The Republic of Ukraine, through the State Property Fund of Ukraine”. But the court granted the creditor leave to enforce the award against, *inter alia*, two separate legal persons: (a) the Republic of Ukraine; and (b) the State Property Fund of Ukraine.

45 Gross J set aside the leave. He explained that the approach to granting leave to enforce an award must be mechanical for two reasons. First, the mechanical approach avoids the court having to go into the merits of the tribunal’s reasoning. Second, where the question is as to the identity of the person against whom the award is to be enforced, any other approach would amount to the court using the state’s sanctions to compel a legal person who was not a party to the arbitration and who is not the subject of the award to comply with the award (at [17]–[18]):

17 ... There is an important policy interest ... in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as “mechanistic” as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused ... the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the

²⁰ DWS at paras 27–28.

enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. ...

18 Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt, true “slips” and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions, is sought in terms other than those of the award. ... In my judgment, this is all inappropriate territory for the enforcing court. The right approach is to seek enforcement of an award in the terms of that award.

46 I therefore accept the defendant’s submission that the court’s approach to an application under s 19 of the Act ought to be and is a mechanical one. The pure mechanical approach is subject only to four qualifications. The first is that which Gross J himself mentions in [18] of *Norsk Hydro*. The court may deviate from the terms of the award when granting leave to enforce it if the deviation does no more than correct a minor clerical error of the type which comes within the slip rule.

47 The second qualification is that it must be the case that the court may deviate from the terms of the award when that is necessary to take into account matters which have occurred *after* the tribunal issued its award and became *functus officio*. Examples of such matters would be a post-award change of name or a post-award assignment or other transfer of the benefit of the award.

48 The third qualification is that the court may deviate from the terms of the award with the parties’ consent to the deviation. Arbitration being founded on consent, a deviation from the terms of the award supported by the parties’ consent at the time of enforcement cannot be objectionable.

49 The fourth qualification is that, quite obviously, the court may deviate from the terms of the award if there is a statutory basis for doing so. There is at present no such statutory basis in s 19 or elsewhere in the Act (*cf* the express power conferred upon the English courts by s 67(3)(b) of the English Act to vary an award when disposing of a challenge as to the tribunal’s substantive jurisdiction).

50 These four qualifications must obviously be kept within narrow confines lest they undermine party autonomy and go beyond minimal curial intervention. Furthermore, a creditor will ordinarily be expected to explain why it did not seek the assistance of the tribunal itself to incorporate the terms of the desired deviation directly in the award, whether under Art 33 of the Model Law or in some other way. Subject to these points, however, I do not think that these narrow qualifications contradict the twin policy imperatives which mandate the mechanical approach.

Applying the mechanical approach

51 The pure mechanical approach applies to this case. The plaintiff, quite correctly, does not suggest that any of the four qualifications I have identified has any possible application.

52 Applying the pure mechanical approach, the leave which has been granted to the *plaintiff* to enforce an award in favour *Hydralift* cannot stand. The tribunal did not intend to issue and did not issue the award in favour of the plaintiff. The leave which the plaintiff has secured goes beyond merely allowing it to enforce the award in the same manner as a judgment *to the same effect*.

53 The result of applying the pure mechanical approach is that only Hydralift has standing to apply for leave under s 19 to enforce the award. It is

not to the point that Hydralift cannot now make any such application (unless, of course, it is restored to the Norwegian companies register under the Norwegian equivalent of s 208 of our Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) or of ss 344(5), 344D(1) and 344F of our Companies Act). The mere fact that Hydralift has ceased to exist does not supply a power to deviate from the dispositive terms of the award when s 19 contains no such power.

54 It is of course true that the rights against the defendant which the award has created spring from the Contract and, in particular from the arbitration agreement in it. It may also be true that the effect of the 2004 mergers has somehow been to project forward in time such that they operated in 2007 (when the arbitration commenced) and 2019 (when the award was issued) to transfer to the plaintiff the contractual benefit of the award. But even that hypothetical prospective transfer cannot supply a power to the court to vary or deviate from the dispositive terms of the award when s 19 contains no such power.

55 If Hydralift had ceased to exist *after* the arbitration commenced in 2007, instead of before, the plaintiff could have plausibly made the following argument. By its award issued at the end of the arbitration, the tribunal intended to benefit Hydralift, the legal person whom the defendant had named as the respondent at the start of the arbitration. But that legal person had ceased to exist while the arbitration was going on. As a result, at the enforcement stage, the court should carry the tribunal's manifest but miscarried intent through to the transferee of Hydralift's contractual rights, *ie*, the plaintiff. That could warrant the enforcing court taking a slightly broader view of the tribunal's intent and construing the use of Hydralift's name in the award as pointing to the plaintiff, being the ultimate transferee of Hydralift's contractual rights. On that basis, having regard to substance over form, it could be said that the plaintiff's leave

to enforce nevertheless comes within the strictures of s 19 of the Act. I say only that this argument would have been plausible, not that it would have succeeded.

56 But on the facts of this case, the plaintiff cannot even begin to make this argument. Hydralift ceased to exist well before the defendant commenced the arbitration. This means that the tribunal's objective intent, manifest in the award, did not miscarry. To grant leave to the plaintiff to enforce this award against the defendant would be to assume a power to enforce an award that the tribunal never intended to issue, had no reason to issue and did not in fact issue.

57 This finding is sufficient in itself to set aside the plaintiff's leave to enforce the award. In case I am wrong on this, however, I go on to consider the four remaining questions the defendant poses.

Is the use of Hydralift's name in the arbitration a misnomer?

58 The second question the defendant poses (see [19] above) is whether the defendant's naming of Hydralift as the respondent in the arbitration was a mere misnomer, *ie*, a mistake merely as to the name of the respondent.

Proceedings commenced by or against a non-existent legal person are a nullity

59 The cases on misnomer follow a dismally familiar pattern. First, a party to an arbitration is misnamed. That could be because the party has changed its name and the arbitration is commenced using its former name (*Unisys International Services Ltd (formerly Sperry Rand Ltd) v Eastern Counties Newspapers Ltd and Eastern Counties Newspapers Group Ltd* [1991] 1 Lloyd's Rep 538 (“*Unisys*”)). Or it could be because the party transferred its rights under the contract to another legal person and ceased to exist (*SEB Trygg Liv Holding*

AB v Manches and others [2006] 1 WLR 2276 (“*SEB Trygg (CA)*” and *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd and others* [2006] 2 All ER (Comm) 225 (“*Harper*”). Or it could be because the party did not enter into the arbitration agreement under which the arbitration is commenced (*Internaut Shipping GmbH and another v Fercometal SARL* [2003] 2 All ER (Comm) 760 (“*Internaut*”). Next, depending on where incentives lie, the claimant (*Unisys*; *Harper*; *Internaut*) or the respondent (*SEB Trygg (CA)*) claims that the misnaming is merely a misnomer, while the opposing party argues that it is fatal.

60 The analysis which follows raises multiple metaphysical issues. Among them are three. What does it mean to speak of “a non-existent legal person”? What does it mean to speak of an act being done by or to “a non-existent legal person”? And how can “a non-existent legal person” be a party to an arbitration? I gloss over these issues by using the phrase “non-existent legal person” to mean simply “a name which does not point to a legal person at the time the name is used”.

61 It is common ground that, where an arbitration is commenced by a non-existent legal person, the arbitration is a nullity unless the use of the name can be characterised as a misnomer.²¹ Both parties accept as authority for this proposition the decision of the English Court of Appeal *SEB Trygg (CA)* at [50]:

Misnomer

50 ... If the proceedings were started on behalf of a party who did not exist, then they were a nullity. If on the other hand it was clear who the party was, but there was simply an error in naming him, the proceedings were not a nullity and the error can, in appropriate circumstances, be corrected within them.
...

²¹ PWS at para 65; DWS at para 44.

62 The proposition at [50] of *SEB Trygg (CA)* as framed applies to proceedings commenced *by* a non-existent legal person. It is possible to argue that proceedings commenced *against* a non-existent legal person, such as this arbitration, are in a category outside this proposition and are therefore not a nullity. The argument would proceed as follows. Proceedings commenced *by* a non-existent legal person, for that reason alone, lack completely any legal foundation. The defect is therefore fundamental and renders the proceedings a nullity. They are in truth, not proceedings at all. On the other hand, proceedings commenced *against* a non-existent legal person do not, for that reason alone, lack a legal foundation. Those proceedings lack only a target. The defect is not fundamental and does not, in itself, render the proceedings a nullity. They are in truth proceedings, albeit misdirected.

63 Despite this possible argument, I proceed on the basis that the proposition at [50] of *SEB Trygg (CA)* applies to proceedings which are both commenced by and against a non-existent legal person. I do so for three reasons.

64 First, the plaintiff does not advance this argument. Thus, the plaintiff accepts that if the defendant's use of Hydralift's name for the respondent in the arbitration cannot be characterised as a mere misnomer, the arbitration is a nullity and the award is unenforceable.²²

65 Second, the court in *SEB Trygg (CA)* stated the proposition in terms of proceedings commenced *by* a non-existent legal person simply because that was the factual situation in the case before it. I do not detect in *SEB Trygg (CA)* any intent to draw a distinction between these two categories. The lack of any such distinction is also consistent with authority, including the first instance decision

²² PWS at paras 67.

from which *SEB Trygg (CA)* arose (*SEB Trygg Holding Aktiebolag v Manches and others* [2005] 2 Lloyd's Rep 129 (“*SEB Trygg (HC)*” at [28])).

66 Finally, I consider to be artificial any attempt to draw a distinction between the foundation and the target of legal proceedings. It is axiomatic that all proceedings must be brought by a legal person against a legal person. It is only if both of those conditions are satisfied that the proceedings are in truth proceedings. A name recognised by law under which one can both sue and be sued is one of the defining features of legal personality (see s 24(2) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed), s 19(5) of the Companies Act and s 2(2) of the Minister for Finance (Incorporation) Act (Cap 183, 2014 Rev Ed)). *Both* of these conditions must be satisfied for proceedings to be, in truth, proceedings. If it were otherwise, the concept of legal personality would lose one of its defining and distinguishing features. That is even more true when the proceedings in question are arbitration rather than litigation. Only a legal person can be party and counterparty to an arbitration agreement. Therefore, only a legal person can assert a right to arbitrate and be subject to an obligation to arbitrate.

67 The plaintiff submits that the arbitration is not a nullity because the use of Hydralift's name to describe the respondent in the arbitration was a mere misnomer for the plaintiff.²³ This submission fails *in limine*. A finding of misnomer is not sufficient in itself to save an arbitration by or against a non-existent legal person from being a nullity. A finding of misnomer saves the arbitration only if the misnomer is corrected within the arbitration itself. That is clear from the proposition in *SEB Trygg (CA)* itself (at [50], cited at [61] above).

²³ PWS at para 80; PLI at para 2(a).

The plaintiff itself accepts that this is the position in law.²⁴ In this case, even if the use of Hydralift's name for the respondent was a misnomer for the plaintiff, the plaintiff made no attempt whatsoever to have the tribunal correct the misnomer before it delivered its award. On that ground alone, this award is outside the scope of the proposition from *SEB Trygg (CA)* on which the plaintiff relies.

68 Furthermore, the plaintiff appears to suggest that a finding of misnomer suffices to allow the plaintiff to enforce an award which the tribunal intended to and did issue in favour of Hydralift even if the misnomer is not corrected within the arbitration. I do not accept this proposition as correct. It contradicts the mechanical approach to enforcement and the twin policies underlying that approach which I have analysed above (at [37]–[50]).

69 Nevertheless, I analyse the plaintiff's submissions on misnomer in the terms in which they are made. The threshold issue for analysing this submission is formulating the test to determine whether the use of a name is a misnomer.

The test for identifying a misnomer

70 The plaintiff submits that the test is this: who would the party standing *opposite* the misnamed party in the arbitration reasonably understand is the correct legal person to participate in the arbitration?²⁵ Thus, if the misnamed party is the *claimant*, the test is whom the *respondent* would reasonably understand is the correct claimant. On the other hand, if the misnamed party is the *respondent* (as in this arbitration), the test is whom the *claimant* would reasonably understand is the correct respondent.

²⁴ PWS at para 72.

²⁵ PWS at para 69.

71 The defendant proposes a different test. The defendant submits that the test is this: who is the legal person that *both* parties would reasonably have understood the misnamed party to be?²⁶

72 There are several material differences between the parties’ formulations. The most obvious is that the plaintiff’s test is unilateral whereas the defendant’s test is bilateral. Despite these differences, both parties claim to derive their formulations from the same passage in the judgment of the English Court of Appeal in *SEB Trygg (CA)*.²⁷

73 In *SEB Trygg (CA)*, four corporate vendors sold shares to a purchaser. One of the vendors: (a) transferred to a subsidiary the beneficial interest in its rights under the contract of sale; (b) merged with its parent, thereby transferring to the parent its obligations under the contract and the bare right to sue on the contract; and (c) ceased to exist (at [5]–[6] and [8]). All four vendors commenced an arbitration against the purchaser (at [2]). The purchaser brought a counterclaim against the four vendors. When the purchaser discovered that one of the vendors had ceased to exist even before commencing the arbitration, it sought a declaration from the court that the tribunal had jurisdiction over the parent, and that the parent would be bound by any award on the counterclaim against the non-existent vendor (at [12]). The parent argued in response that it had never been a party to the arbitration.

74 The English Court of Appeal held that naming the non-existent vendor was a mere misnomer. It found that the purchaser, as the respondent in the arbitration, would reasonably have understood that the intended claimants were

²⁶ DWS at para 46.

²⁷ DWS at para 46; PWS at para 66.

the four holders of the vendors' rights under the contract and no other persons. Therefore, naming the non-existent vendor as a claimant was a mere misnomer for the parent, being the transferee of the non-existent vendor's bare right to sue on the contract. This meant that the arbitration was not a nullity in so far as it involved a claim by and against the non-existent vendor (at [51]–[52] and [54]):

51 ... We prefer to state the question as one of principle, namely, *who would reasonably have been understood by the party against whom the claim was asserted to be the entity bringing the claim?* Within the misnomer cases, that approach is that of Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 In our case, the proceedings were commenced on the instructions of [the vendors' agent], acting on the authority of [a director]. But what was the nature of that authority? Plainly, to protect the interests of the vendors ... [The vendor's agent] had no business to include a claimant in the proceedings, and [the director] had no business to permit him to do so, unless that claimant was one of those vendors. [The non-existent vendor] was therefore a claimant as, but only as, one of the vendors.

52 That would have been obvious, to the extent of not even needing thought, to [the purchaser]. And it would also have been obvious from a scrutiny of the pleadings. ... *[T]he best source for what the claimant actually intended is to be found in the points of claim.* In our case the pleadings unequivocally said that they were brought jointly by the [vendors]. In those circumstances the fact that the title of the proceedings did not record that the relevant vendor had transferred all of its rights to [the parent] ... was indeed a mere misnomer.

...

54 ... *the pleadings in this case could not leave anyone in any possible doubt* that they were advanced on behalf of the vendors ... and of no one else.

[emphasis added]

75 *SEB Trygg (CA)* thus framed the test for identifying a misnomer in the following proposition at [51]: "...who would reasonably have been understood by the party against whom the claim was asserted to be the entity bringing the

claim?”. It is from this proposition that both parties have derived their formulations of the test for misnomer (see [70]–[71] above).²⁸

76 In my view, the plaintiff’s formulation is not supported by the authority of *SEB Trygg (CA)*. In any event, it is also my view that the test as framed at [51] of *SEB Trygg (CA)* turns on the facts of that case and is not capable of universal application. For the reasons which follow, I consider the defendant’s formulation of the test to be more accurate, to be closer to the authority of *SEB Trygg (CA)* and also to be capable of universal application.

77 Every time a party is misnamed in an arbitration, there are two roles on offer: (a) there is the person who introduces the mistaken name into the arbitration; and (b) there is the person who is in a better position (as between the parties) to detect and correct the mistaken name. I use the word “person” here rather than “party” because the subject of the inquiry must extend beyond the party formally misnamed in the foundational documents of the arbitration to the person who instructs agents such as solicitors to do acts on behalf of the misnamed party in the arbitration.

78 With those two roles in mind, I make two points about *SEB Trygg (CA)*.

79 First, both roles in *SEB Trygg (CA)* were played by the same person: the parent. Not only that, but the parent was also the person arguing that its own misnaming of one of the vendors rendered the arbitration a nullity, at least in part. It is exceedingly unattractive for a person to argue that a name which it has mistakenly introduced into an arbitration – being a mistake which it was and is in the better position to detect and correct – renders the arbitration in part a

²⁸ PWS at para 70.

nullity. The English Court of Appeal identified this as one of the singular features of *SEB Trygg (CA)* (at [50]). That is perhaps one reason why this decision represents the high-water mark of the misnomer cases. It is not unreasonable to think that the analysis, and perhaps even the outcome, could well have been different if it had been the purchaser, rather than the parent, who argued that the arbitration was a nullity.

80 The second point I make about *Seb Trygg (CA)* is that the court framed the test solely from the perspective of the party opposite the misnamed party because that was a case in which one person – the parent – played both of the roles I have identified at [77] above. In that sense, there was in *SEB Trygg (CA)*, one party (the parent) who bore all of the notional responsibility for misnaming and another party (the respondent) who bore none of that responsibility. It was therefore entirely correct and understandable for the court to frame and apply the test *only* from the perspective of the party opposite the misnamed party. But the same person will not always play both roles. The present case is an example. Like *SEB Trygg (CA)*, it was the defendant (as the claimant in the arbitration) who mistakenly introduced Hydralift's name. But unlike *SEB Trygg (CA)*, it was the plaintiff (as the party instructing solicitors to participate in the arbitration in the name of Hydralift) who was in the better position to detect and correct the mistaken name.

81 In my view, therefore, it is wrong in principle to attempt to identify a misnomer in a situation such as this where the roles are split by looking at the misnaming solely from the perspective of the party opposite the misnamed person. This approach would result in an incomplete analysis of whether the case is indeed one of misnomer. In a case where the roles are split, the test must consider both parties' perspectives: to whom did each party intend to refer when

it used the non-existent legal person's name in the arbitration? This is, in essence, the defendant's formulation of the test (see [70] above).

82 There are two other conceptual reasons for rejecting the plaintiff's formulation of the test. First, the plaintiff's formulation incorporates an external reference point against which the intent of the party opposite the misnamed party is to be assessed. That external reference point is the concept of the "correct" legal person to participate in the arbitration. It appears to me that assessing intent against an external reference point in this way amounts to rigging the test in favour of a finding of misnomer. Conceptually, whether there is or is not a misnomer should turn only on the parties' intent. I therefore consider the defendant's formulation, confined as it is to an assessment of each party's intent, to be preferable. Second, the plaintiff's test is capable of yielding different answers over time. The "correct" legal person to participate in an arbitration can change, as a result of assignment or by transmission through mergers. This can happen even after the arbitration is well under way. It appears to me to be wrong conceptually to use a dynamic test such as the plaintiff's to identify a misnomer. In any given arbitration, there is either a misnomer or there is no misnomer. The defendant's formulation of the test is static, as it should be. It turns on the parties' intent taken as a whole, assessed from the time the misnamed party is introduced into the arbitration. It can yield only one, unchanging answer.

83 In terms of applying the test for misnomer, it is common ground that the test turns on objective intent and not subjective intent.²⁹ In *SEB Trygg (CA)*, the court drew a distinction between litigation and arbitration for this purpose. As the court put it (at [50]), litigation is governed by statute (*ie*, the rules of court)

²⁹ PWS at para 69; DWS at para 52.

whereas arbitration is governed by contract (*ie*, the parties' arbitration agreement). Whatever may be the position in litigation, therefore, the usual objective contractual approach applies to the intent necessary to identify a misnomer in an arbitration. That is why the court (at [51]) framed the test objectively, *ie*, in terms of reasonableness. That is also why the court (at [52] and [54]) applied the test objectively, by examining the subject-matter of the arbitration and by scrutinising the pleadings (see the italicised passages cited at [74] above). The test thus turns in the usual contractual way on what the parties said or did, not on what they thought, believed or intended without manifesting it. Relevant evidence of objective intent therefore includes the notice of arbitration and the pleadings (*Unisys* at 550 and 560; *SEB Trygg (CA)* at [52]). Uncommunicated (*ie*, subjective) intent is not relevant (*Unisys* at 560).³⁰

84 Incorporating objective intent into the test for misnomer, it can be formulated as follows: to whom did each party objectively intend to refer when it used the misnamed party's name in the arbitration? Because the test is both bilateral and objective, it can also be reformulated without changing its meaning as follows: to whom did each party reasonably understand the other party to be referring when it used the non-existent legal person's name in the arbitration.

85 In applying this test from a given party's perspective, it is legitimate to take into account that party's knowledge or ignorance of the material facts, provided that its knowledge or ignorance was manifest. This does not amount to turning an objective test into a subjective test. The test still considers the question of intent in objective terms: solely from each party's outward manifestations of its intent and how those outward manifestations would have been reasonably understood. But it is meaningless to assess how those outward

³⁰ PWS at 71.

manifestations would have been understood in a vacuum. They can only be reasonably understood in light of that party's state of manifest knowledge or ignorance.

86 I now apply this test to the facts of this case. I start by making findings about the parties' manifest knowledge or ignorance of the material facts. I then apply the test from each party's perspective.

The parties' knowledge or ignorance

87 In this case, there are two facts which are material to applying the test for misnomer: (a) the fact that the 2004 mergers transferred Hydralift's rights and obligations under the Contract to the plaintiff; and (b) the fact that Hydralift ceased to exist upon its merger with NOH taking effect. I make four findings about the parties' knowledge or ignorance of these two material facts.

88 First, and quite obviously, I find that the plaintiff knew both of these material facts at all times. The plaintiff does not allege any mistake or oversight on its own part about these two material facts. Indeed, it cannot credibly do so.

89 Second, I find that the plaintiff's knowledge of these facts was manifest. Who better to know where Hydralift's rights and obligations under the Contract resided in 2007 than the plaintiff? In the absence of any contemporaneous indication that the plaintiff was in doubt about either of these material facts, the plaintiff's knowledge of these facts was manifest.

90 Third, I accept the defendant's evidence that it was ignorant of these material facts until the plaintiff attempted to enforce the award in 2019. The mere fact that the defendant used Hydralift's name to refer to the respondent in the arbitration establishes this. The defendant had no incentive to do so if it had

known either of these facts. Indeed, the defendant had a very strong disincentive against doing so. The defendant was the claimant in the arbitration. It was pursuing a claim against the respondent which was several multiples of the counterclaim (see [7] above). No reasonable claimant in these circumstances would have named Hydralift as the respondent – let alone incurred the time, cost and expense of pursuing the arbitration for 12 years – unless it was ignorant of these two facts. The plaintiff does not go so far as to suggest that the defendant had some ulterior or tactical purpose for using Hydralift's name in the arbitration despite knowing these two facts. I am therefore satisfied that the defendant was ignorant of both of these facts until the plaintiff revealed them to the defendant in 2019.

91 Fourth, I find that the defendant's ignorance of these facts was manifest throughout the arbitration. That is established not only by the objective points which I have set out to support my third finding, but also by the plaintiff's conduct on behalf of Hydralift in 2015 and 2016. That is when the defendant commenced litigation related to the arbitration against various members of the tribunal and Hydralift (see [125]–[126] below).³¹ The defendant named Hydralift as a co-defendant in this litigation on the basis that Hydralift was the respondent in the arbitration and ought to be bound by the court's decision in the litigation.³² As I find below (at [125]–[126]), the plaintiff actively concealed the merger and Hydralift's dissolution from the defendant. The plaintiff would not have engaged in this extraordinary conduct if the defendant's ignorance of these two facts was not manifest and if the plaintiff did not want the defendant to continue with the arbitration in its ignorance. In making this finding, I reject

³¹ HC/OS 168/2015, HC/OS 223/2015 and HC/OS 680/2015.

³² JBOD vol 2 at pp 1037–1042.

Mr Jensen’s evidence that the plaintiff “always thought that [the defendant] knew that [the plaintiff was] the successor company” of Hydralift.³³

92 With these findings in mind, I now apply the test at [84] above to the facts of this case from each party’s perspective. I start with the defendant’s perspective because it was the defendant who mistakenly introduced Hydralift’s name into the arbitration.

The defendant’s objective intent

The defendant objectively intended Hydralift’s name to refer to Hydralift

93 What I have to determine now, bearing in mind the defendant’s ignorance of the two material facts, is this: to whom did the defendant objectively intend to refer when it used Hydralift’s name in the arbitration?

94 I find that the defendant objectively intended Hydralift’s name to refer to Hydralift and not to the plaintiff. As far as the defendant knew: (a) Hydralift entered into the Contract with the defendant; (b) Hydralift continued to hold the rights and owed the obligations arising under the Contract; and (c) Hydralift continued to exist as a legal person. The defendant therefore had every reason objectively to intend Hydralift’s name to refer to Hydralift. Further, as far as the defendant knew: (a) the plaintiff was a stranger to the Contract; (b) the plaintiff was not the transferee of any of Hydralift’s rights or obligations arising under the Contract; and (c) the plaintiff was a holding company of Hydralift. The defendant therefore had no reason whatsoever objectively to intend Hydralift’s name to refer to the plaintiff.

³³ JBOD vol 3 at p 1608, para 22.

95 The answer is the same, and for the same reasons, if I consider to whom the defendant reasonably understood the *plaintiff* to refer when the *plaintiff* used Hydralift's name for the counterclaim in the arbitration. The defendant had every reason to understand the plaintiff's use of Hydralift's name as referring to Hydralift, and absolutely no reason to understand the plaintiff to be using Hydralift's name to refer to the plaintiff.

The defendant did not objectively intend Hydralift's name to refer to whoever was then liable to the defendant on the Contract

96 To counter this finding, the plaintiff argues that the defendant must be taken objectively to have intended Hydralift's name throughout the arbitration to refer to the plaintiff, the plaintiff being the legal person liable on the Contract³⁴ and therefore the correct legal person to participate in the arbitration.³⁵

97 In support of this argument, the plaintiff relies on the parties' correspondence after Hydralift had ceased to exist.³⁶ From 2001 to 2007, the defendant and Hydralift were attempting in vain to resolve their dispute. During this period, in 2006 and again in 2007, the plaintiff's performance guarantee³⁷ under the Contract was extended by agreement. Upon each extension, the issuing bank sent a notice to the defendant confirming that the guarantee had been extended. The bank addressed each of these notices to, amongst

³⁴ PWS at para 73.

³⁵ PWS at para 69.

³⁶ Transcript 22 September 2020 at p 83, line 25 to p 84, line 5.

³⁷ JBOD vol 1 at p 53, para 68.

others, “National Oilwell Norway AS (Former Hydralift ASA)”.³⁸ “National Oilwell Norway AS” is the plaintiff’s former name (see [8(d)] above).

98 The defendant then echoed this description in its own correspondence with the plaintiff. Thus, several days after the defendant issued the notice of arbitration, the defendant’s inhouse counsel sent to an employee of the plaintiff an email³⁹ with the subject header “B241 (Saga Varg) : KFELS vs. *Hydralift (NOV)*” [emphasis added].⁴⁰ NOV is one of the possible abbreviations for the plaintiff’s name.

99 The plaintiff submits that this description of Hydralift in the contemporaneous correspondence shows that, when the defendant chose to name Hydralift in the notice of arbitration, its objective intent was simply to bring in as the respondent in the arbitration whoever was the correct legal person then liable to the defendant under the Contract.⁴¹

100 I reject this submission for three reasons.

101 First, as the defendant submits,⁴² the descriptions “National Oilwell Norway AS (Former Hydralift ASA)” and “Hydralift (NOV)” are ambiguous.⁴³ They could mean, as the plaintiff submits, that Hydralift had changed its name. They could also mean, as the plaintiff submits, that Hydralift had transferred its rights and obligations under the Contract to “National Oilwell Norway AS” or

³⁸ JBOD vol 3 at pp 1650, 1652 and 1654.

³⁹ JBOD vol 3 at p 1607, para 19.

⁴⁰ JBOD vol 3 at p 1658.

⁴¹ Transcript 22 September 2020 at p 83, lines 1–15.

⁴² Transcript 22 September 2020 at p 145, lines 14–25.

⁴³ JBOD vol 3 at pp 1650, 1652 and 1654.

to “NOV”. But they could also mean, as the defendant submits, that “National Oilwell Norway AS” or “NOV” had acquired Hydralift’s shares, with Hydralift continuing in existence as the legal person liable to the defendant for breaches of the Contract. Significantly, the issuing bank’s notices continued to describe the guarantee as having been issued “on behalf of *M/S Hydralift ASA*” [emphasis added].⁴⁴ According to the defendant, this “accorded with [the defendant’s] understanding (at the time) that Hydralift remained a live entity”.⁴⁵

102 Second, if the defendant indeed understood these descriptions of Hydralift in 2006 and 2007 in the way the plaintiff now submits it did, the inevitable consequence would have been the complete opposite of what the defendant actually did when it commenced the arbitration. Any reasonable claimant acting rationally with that knowledge would undoubtedly have commenced arbitration using the *plaintiff’s* name to refer to the respondent instead of Hydralift’s name. As I have already mentioned (at [90] above), the defendant had absolutely no incentive to commence the arbitration against any legal person other than the person it then believed to be liable on the Contract.

103 Third, the fact that the defendant chose to commence the arbitration using Hydralift’s name for the respondent despite these descriptions of Hydralift in this contemporaneous correspondence supports the defendant’s case, not the plaintiff’s. Names are treated with a relative degree of informality in correspondence, particularly between lay persons, and with a high degree of formality when commencing proceedings. The defendant’s conduct in naming Hydralift as the respondent despite Hydralift’s description in this contemporaneous correspondence suggests that the defendant made a conscious

⁴⁴ JBOD vol 3 at pp 1651, 1653 and 1655.

⁴⁵ JBOD vol 3 at p 1797, para 10(a).

decision to reject any implication or inference arising from these descriptions and intended objectively to bring in Hydralift – and only Hydralift – as the respondent to the arbitration.

104 The plaintiff even goes so far as to generalise its proposition and submit that *every* claimant in *every* arbitration objectively intends to name as the respondent to the arbitration whoever is the correct legal person then liable to the claimant on the underlying contract. I reject this submission. It puts the analysis at such a high level of abstraction that it renders any use of a name completely otiose.

105 For this submission, the plaintiff relies on *Unisys, SEB Trygg (HC)* and *The “Sardinia Sulcis” and “Al Tawwab”* [1991] 1 Lloyd’s Rep 201 (*“The “Sardinia Sulcis”*”).⁴⁶ Given that *The “Sardinia Sulcis”* is the case which most directly supports this submission, I focus my analysis on that case.

106 In *The “Sardinia Sulcis”* a plaintiff had merged and ceased to exist under Italian law before an action was commenced in its name. The defendant argued that the action was a nullity and should be struck out, having been commenced by a non-existent legal person. The English Court of Appeal held that what had happened was a mere misnomer. The plaintiff was therefore granted leave to amend its own name to reflect the name of the legal person which continued in existence after the merger.

107 Lloyd LJ (as he then was) framed the test in terms of whether there could have been any reasonable doubt as to the identity of the person intending to sue. The plaintiff adopts Lloyd LJ’s formulation and transposes it to apply to a

⁴⁶ Transcript 22 September 2020 at p 60, line 23 to p 68, line 2.

respondent. The plaintiff’s submission is thus that the legal person “intended to be sued” in an arbitration is the legal person in whom the obligations under the contract in question are vested at the material time.⁴⁷

108 I do not accept the plaintiff’s reliance on *The “Sardinia Sulcis”* for four reasons.

109 First, the plaintiff’s submission overlooks the conceptual difficulties with the test which Lloyd LJ himself acknowledged. Thus, Lloyd LJ expressly acknowledged that the concept of “the person intending to sue” or “the person intended to be sued” could be applied at such a high level of abstraction as to render it meaningless as a test for misnomer (at 207 RHC):

In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. ...

110 He therefore added a gloss to the test which assesses intent by looking at how the misnamed respondent has been described, not simply at whether the person is liable for the wrong. Thus, if the legal person intended to be sued is described in the proceedings in a way which is clear, an error in stating its name will be a mere misnomer (at 207 RHC):

... if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise. ...

Returning to the facts of the present case, there could be no reasonable doubt as to *the identity of the person intending to sue, namely, the person in whom the rights of ownership were vested at the date when the writ was issued*. ... The description of the intending plaintiffs was clear enough. It follows that [the]

⁴⁷ Transcript 22 September 2020 at p 67, line 22 to p 68, line 2.

mistake was a mistake as to name, and not a mistake as to identity. ...

[emphasis added]

By omitting all reference to the description of the misnamed party, the plaintiff is advocating and applying a test for misnomer for which *The “Sardinia Sulcis”* is not authority.

111 Second, on the test for which *The “Sardinia Sulcis”* is authority, the plaintiff fails. This is not a case where the defendant got the right description for the plaintiff but got its name wrong. All of the historical facts used to describe the respondent in the arbitration point only to Hydralift. None point to the plaintiff. It was Hydralift who entered into the Contract with the defendant. It was Hydralift who carried out the rectification work which was part of the subject matter of the arbitration. It was Hydralift who incurred the loss and expense which was also part of the subject matter of the arbitration. These descriptions are all matters of historical fact. The historical facts do not change when the rights and obligations under the Contract are transferred. These historical facts are incapable of describing the plaintiff.

112 Third, the test formulated in *The “Sardinia Sulcis”* is the test for the misnomer necessary to secure leave to amend the name of a party in *ongoing proceedings*, ie, before the proceedings conclude and before the court becomes *functus officio*. That is precisely what the plaintiff in *The “Sardinia Sulcis”* did. So too, in *Unisys* and *SEB Trygg (HC)*, the party alleging misnomer took the issue to the court while the arbitration was ongoing and before the tribunal became *functus officio*. That is not the situation in this case. The plaintiff never applied during the arbitration – whether to the tribunal or (to the extent permissible) the court – to adjudicate upon the nature and effect of using Hydralift’s name for the respondent in the arbitration. Instead, the plaintiff

permitted the tribunal to issue the award in favour of Hydralift and become *functus officio*.

113 The plaintiff complains that, following the award, the defendant refused to consent to the plaintiff taking the question of misnomer to the tribunal under Art 33 of the Model Law outside the 30-day window stipulated in that provision. But the defendant had no duty to consent. The real question is why the plaintiff did not raise this issue with the tribunal before the tribunal became *functus officio* or, even after it had issued the award but before the plaintiff needed the defendant's consent to refer the issue of misnomer to the tribunal. All of this, of course, assumes that a change of this nature comes within the limited scope of Art 33 of the Model Law.

114 Finally, *The "Sardinia Sulcis"* was decided under the English rules of court and not in the context of arbitration. As the court pointed out in *SEB Trygg*, the two types of proceedings raise different considerations (see [83] above). In particular, the proper approach in arbitration to an allegation of misnomer is a contractual approach, not a statutory approach.

Conclusion on the defendant's objective intent

115 For all of the foregoing reasons, I find that the defendant objectively intended its use of Hydralift's name, and reasonably understood the plaintiff's use of Hydralift's name, to refer to Hydralift and not to the plaintiff throughout the arbitration.

116 From the defendant's perspective, therefore, there was no misnomer. Indeed, the defendant's mistake was neither a mistake as to the name of the respondent nor as to the identity of the respondent. The defendant's only mistake was as to one of the attributes of its intended respondent, albeit a most

fundamental attribute: whether it existed as a legal person. However, it is not the defendant's mistake as to this attribute which is relevant to whether the arbitration is a nullity. What is relevant is whether the defendant objectively intended to commence the arbitration against a non-existent legal person. From the defendant's perspective, I have found that that was indeed its objective intent.

117 I now apply the test at [84] above from the plaintiff's perspective.

The plaintiff's objective intent

118 What I now have to determine, bearing in mind the plaintiff's knowledge to the extent it was manifest, is this: to whom did the plaintiff objectively intend to refer when it used Hydralift's name in the arbitration? I find that the plaintiff's objective intent in using Hydralift's name in the arbitration was also to refer to Hydralift and not to refer to the plaintiff. I say that for three reasons.

119 First, the plaintiff made no mistake of any sort in using Hydralift's name in the arbitration. Quite unlike the defendant, the plaintiff knew both material facts (see [87] above). Despite this, it used Hydralift's name in the arbitration rather than the plaintiff's name. The only inference I can draw is that this was a deliberate and a conscious choice. The fact that the plaintiff was merely, at first at least, following the defendant's lead does not detract from this inference. In these circumstances, the plaintiff's objective intent in using Hydralift's name can only have been to refer to Hydralift and not to the plaintiff.

120 Second, the plaintiff's own description of the respondent in its pleadings in the arbitration matches Hydralift, not the plaintiff. For example, the plaintiff's defence and counterclaim describes the respondent in the arbitration as the legal person who carried out various rectification works on the subject matter of the

Contract.⁴⁸ These works were carried out between 1999 and 2001.⁴⁹ As a historical fact, the legal person who carried out these works was Hydralift, not the plaintiff.⁵⁰ Further, the defence and counterclaim also describes the respondent in the arbitration as the legal person who was put to expense and who incurred loss in investigating and rectifying the problems which formed part of the subject matter of the arbitration.⁵¹ As a historical fact, the legal person who was put to that expense and who incurred that loss was Hydralift, not the plaintiff.⁵² And the defence and counterclaim makes no attempt to connect Hydralift to the plaintiff by pleading that Hydralift transferred to the plaintiff its rights against the defendant under the Contract.

121 Third, the plaintiff went well beyond implied assertions to positive assertions. Thus, for example, Mr Jensen’s witness statement in the arbitration positively asserted that Hydralift was owned by National Oilwell Varco Inc:⁵³

I am presently the Managing Director of [the plaintiff] which is a company based in Kristiansand, Norway. Hydralift AS was acquired by National Oilwell Inc. (an American Multi-National Corporation) in late 2002. In 2005, National Oilwell Inc. merged with Varco to become National Oilwell Varco Inc. (“NOV”). NOV is the owner of Hydralift AS, the Respondents in this arbitration reference. After the acquisition of Hydralift AS by NOV, [the plaintiff] assumed the business portfolio of the former. [The plaintiff] is a fully owned subsidiary of NOV.

...

Prior to its *acquisition by NOV*, the Respondents were a leading designer/supplier of offshore/marine cranes, rotating and pipe-

⁴⁸ JBOD vol 2 at pp 886–889, para 41.

⁴⁹ JBOD vol 2 at pp 856–858, para 31.

⁵⁰ Transcript 29 June 2020 at p 8, line 14 to p 9, line 12.

⁵¹ JBOD vol 2 at p 892, para 48.

⁵² Transcript 29 June 2020 at p 9, lines 13–23.

⁵³ JBOD vol 2 at pp 637–638, paras 21–22 and pp 947–951; PWS at paragraph 15 and 50.

handling equipment, hoisting and drilling equipment and custom designed hydraulic systems for the oil and gas and marine industries ... The Respondents also have experience in the design and supply of (amongst others) integrated turret bearing control systems for FPSO vessels. The Respondents were a company listed with the Oslo Stock Exchange but were subsequently delisted following its *acquisition by NOV*.

[emphasis added]

122 It is telling that, in this passage, Mr Jensen discloses that “National Oilwell Inc. merged with Varco” in 2005 but does not disclose that Hydralift merged with NOH in 2004. Instead, he consistently uses the words “acquire” and “own” to describe the corporate changes affecting Hydralift. The only inference I can draw is that Mr Jensen was well aware of the distinction between a merger and an acquisition and chose to misdescribe Hydralift’s merger with the plaintiff via NOH.

123 In this witness statement, Mr Jensen states by a combination of explicit assertions, implied assertions and silence that Hydralift was: (a) a separate legal person from the plaintiff; (b) an existing legal person, by using the present tense in describing its ownership; and (c) the legal person who was respondent in the arbitration.

124 A more egregious positive and false assertion came in the related litigation which the defendant commenced in 2015 and 2016 in Singapore. I now describe that litigation.

125 In 2015, the defendant filed three originating summonses in the High Court applying to have the court remove one or more of the arbitrators under Art 13(3) of the Model Law on grounds of an alleged lack of impartiality or

independence.⁵⁴ In all three applications, the defendant named the impugned arbitrators and Hydralift as defendants. All three applications came before me at a single hearing in 2017. The plaintiff appeared on all three applications in the name of Hydralift and presented submissions opposing the defendant's attempt to remove the arbitrators. I dismissed all three applications and awarded a total of \$50,000 in costs, ostensibly to Hydralift.

126 In 2016, the defendant filed an originating summons in the Court of Appeal seeking leave to appeal against one of my interlocutory decisions in one of the three applications then pending before me.⁵⁵ The originating summons in the Court of Appeal once again named the impugned arbitrators and Hydralift as defendants. Once again, the plaintiff appeared in the Court of Appeal in the name of Hydralift and presented submissions opposing the defendant's application. The Court of Appeal dismissed the summons and awarded \$2,000 in costs, ostensibly to Hydralift.

127 In each of the three applications before me, one Mr Haavard Endal filed affidavits on behalf of Hydralift. In all of those affidavits, he too referred to the plaintiff having acquired the defendant rather than having merged with Hydralift via NOH.⁵⁶ In the following passage from one of Mr Endal's affidavits, "the 3rd Defendant" is Hydralift:⁵⁷

I am the Regional Counsel (Europe) of [the plaintiff], a company incorporated under the laws of Norway, and a wholly-owned subsidiary of National Oilwell Varco Inc. based in the USA ("NOV Inc."). [The plaintiff] has assumed the business portfolio of the 3rd Defendant [*ie*, "Hydralift"] following the acquisition

⁵⁴ HC/OS 168/2015, HC/OS 223/2015 and HC/OS 680/2015.

⁵⁵ CA/OS 15/2016.

⁵⁶ DWS at para 17.

⁵⁷ See, *eg*, JBOD vol 2 at p 1099.

by NOV Inc. of the 3rd Defendant in or about 2004. I am authorised to make this affidavit on behalf of the 3rd Defendant.

128 It could be said that Mr Endal’s assertions are ambiguous because they refer both to National Oilwell Varco Inc acquiring Hydralift (which implies that one legal person purchased the shares in the other, with two distinct legal persons continuing in existence after the purchase) and also to the plaintiff assuming Hydralift’s business portfolio (which could be read as implying a merger where a transferor merges with a transferee company and ceases to exist).

129 There is no ambiguity, however, in the most egregious of the plaintiff’s positive assertions in the related litigation. Our civil procedure requires the claimant to specify the unique identification number of the parties to the proceedings, to the extent that it can. In the four originating summonses which it filed in 2015 and 2016, the defendant left Hydralift’s unique identification number unspecified. The plaintiff’s affidavits, however, volunteered a unique identification number for Hydralift. The number the plaintiff chose to provide was not Hydralift’s historical identification number, *ie* the registration number which had been assigned to Hydralift in the Norwegian companies register before it was struck off in 2004.⁵⁸ The number was also not the plaintiff’s own identification number, on the basis that any use of Hydralift’s name after it had ceased to exist now pointed to the plaintiff. Instead, the identification number which the plaintiff chose to provide for Hydralift was the identification number of a completely different legal person: a legal person who was neither the plaintiff nor Hydralift and who was entirely unrelated to the Contract and to the

⁵⁸ JBOD vol 3 at p 1609, para 25.

dispute which arose from it.⁵⁹ This legal person was a Norwegian company originally known as Startfase 80 AS. For unexplained reasons, Startfase 80 AS changed its name to “Hydralift AS” in 2004 and used that name until 2017.⁶⁰ The plaintiff’s conduct in volunteering this unrelated company’s identification number in the related litigation is, to say the least, extraordinary. It suggests to me a deliberate decision to prevent the defendant from discovering the 2004 mergers and the dissolution of Hydralift.

130 Even more extraordinary is the explanation which Mr Jensen now offers for this conduct. In his affidavit filed in this application, Mr Jensen says:⁶¹

We were asked to provide the ID No. of “A/S Hydralift” but as it had already been struck off the Norwegian companies register this was not possible. There were 2 ID Nos we thought we could use. One was that of [the plaintiff] (ID No. 936 738 540); the other was that of another company called “Hydralift AS” (ID No. 984 755 481). ...

We eventually decided to use the ID No. of the “new” “Hydralift AS” ID No. for the [related litigation] in order not to complicate matters. After all, [the defendant] had named the respondent to the Arbitration as “AS Hydralift” and [one application to the High Court] (as well as the subsequent application to the Singapore Court of Appeal) were all expressed to be in the matter of the Arbitration between [the defendant] and “AS Hydralift”. ...

131 As the defendant points out, this explanation is extraordinary for two reasons. First, it establishes that the plaintiff was well aware during the arbitration and during the related litigation that Hydralift had ceased to exist and

⁵⁹ DWS at paras 17–18.

⁶⁰ JBOD vol 2 at p 1098; JBOD vol 3 at p 1609, paras 25–26; JBOD vol 3 at p 1228, paras 29–32; JBOD vol 2 at p 640, paras 26–27.

⁶¹ JBOD vol 3 at p 1609, paras 25–26.

therefore no longer had its own identification number.⁶² It establishes also that the plaintiff never saw Hydralift's name as pointing to the plaintiff, *ie*, as a legal synonym for the plaintiff's name. This contradicts Mr Jensen's evidence that the plaintiff never saw Hydralift and the plaintiff as two separate legal persons and instead conducted itself as Hydralift, albeit under a new name.⁶³

132 Second, Mr Jensen's explanation confirms the plaintiff's desire to conceal the 2004 mergers and Hydralift's striking off from the defendant and the tribunal in the arbitration; and from the defendant, the High Court and the Court of Appeal in the related litigation. That is the only conclusion I can draw from the plaintiff's decision to provide the registration number of a company unrelated to the dispute which coincidentally bore the same name as Hydralift and the carefully chosen words "in order not to complicate matters" in the explanation which Mr Jensen now offers. A reasonable litigant in this situation would have readily "complicated" matters by disclosing the truth to the defendant, to the tribunal and to both courts. The truth was that the plaintiff could not provide Hydralift's identification number because Hydralift did not exist. The plaintiff's decision to provide the identification number of another company with the same name did not avoid complicating matters. It merely postponed the reckoning.

133 For all these reasons, I find that the plaintiff's objective intent in using Hydralift's name in the arbitration was to refer to Hydralift and not to refer to the plaintiff.

⁶² DWS at para 18.

⁶³ JBOD vol 3 at p 1612, para 32.

134 The plaintiff’s objective intent was therefore the same as the defendant’s (see [115] above). From both parties’ perspective, the use of Hydralift’s name in the arbitration was objectively intended to refer to no legal person other than Hydralift. I therefore reject the plaintiff’s submission that the parties’ use of Hydralift’s name in the arbitration was a misnomer for the plaintiff.

135 In fact, as with the defendant, the plaintiff made neither a mistake as to name nor a mistake as to identity when it used Hydralift’s name to refer to the respondent in the arbitration. The plaintiff was not even mistaken as to any of Hydralift’s attributes, such as whether it was a legal person.

Husmann

136 In an attempt to forestall the inevitable conclusion that the arbitration and the award are a nullity, the plaintiff relies on the case of *Husmann*.⁶⁴ In that case, the English Court of Appeal had to determine whether one Mr Pharaon was the respondent in an arbitration. He had entered into a contract using his unincorporated trading name, “Al Ameen Development and Trade Establishment” (“the Establishment”) and its registration number. He later incorporated a company named “Al Ameen Development & Trade Co” (“the Company”). But Mr Pharaon did not transfer his rights or obligations under his contract with the claimant to the Company.

137 The claimant named the Establishment as the respondent in its notice of arbitration. But the claimant’s pleading defined the respondent as follows: “Al Ameen Development & Trade Establishment (also known as Al Ameen Development & Trade Co.) a limited liability company”. This was wrong in two

⁶⁴ Transcript 22 September 2020 at p 73, lines 29–30.

respects: (a) it defined the Company's name as a legal synonym for the Establishment; and (b) it averred that the Establishment was in fact an incorporated legal person. But the registration number given in this pleaded definition was the Establishment's registration number (at [18]–[19]). Given that the claimant's contractual counterparty was Mr Pharaon, the Court of Appeal treated the references to the Company in the pleaded definition as a mere mistake as to name and held that the Establishment was the respondent in the arbitration (at [67]–[69]).

138 The plaintiff argues by analogy that the fact that the documents in this arbitration repeatedly used Hydralift's name for the respondent does not establish that the parties objectively intended Hydralift's name to refer to Hydralift.⁶⁵ That is undoubtedly so. The question which remains is whether this is a misnomer. But *Hussmann* does not assist the plaintiff in establishing that this was a misnomer. In *Hussman*, the claimant conflated two legal persons (Mr Hussman and the Company) into a single legal person and wrongly treated their separate names as legal synonyms pointing to the same legal person. But the claimant also described the respondent by a unique descriptor, *ie*, its registration number. That descriptor sufficed to indicate precisely whom the claimant objectively intended the respondent in the arbitration to be.

139 In the present case, the defendant's notice of arbitration, the pleadings and the award consistently refer to the respondent in the arbitration using Hydralift's name. But, unlike *Hussmann*, the objective, historical terms in which all of these documents describe the respondent in the arbitration match Hydralift and do not match the plaintiff. *Hussman* therefore does not assist the plaintiff.

⁶⁵ Transcript 22 September 2020 at p 77, lines 13–14.

Conclusion on misnomer

140 For all of the foregoing reasons, I do not accept that the defendant and the plaintiff used Hydralift’s name in the arbitration as the result of a mere misnomer for the plaintiff.

141 As the plaintiff accepts, if I were to apply its test for misnomer at the very high level of abstraction that it advocates, the logical consequence is this: a claimant who secures an award against a respondent literally named as “XYZ” – where no legal person by the name “XYZ” exists, has ever existed, or has ever had any plausible connection to underlying contract or the arbitration agreement – can be enforced against whichever legal person is then liable on the contract, by whatever name that legal person is actually known, so long as that person has come in and participated in the arbitration in the name of “XYZ”.⁶⁶ That may be the result on the facts and circumstances of a particular case, either by operation of an estoppel or by application of s 2A(6) of the Act. But I cannot accept that submission as a general proposition as to what amounts to a misnomer. If it is correct, then no notice of arbitration and no writ need name a respondent or defendant ever again.

142 Ultimately, the plaintiff’s submission subverts completely the natural purpose and significance of a name, both as a matter of language and as a matter of law. A name is a label which points to a legal person and to its collection of attributes. Those attributes are both factual and legal. One of its most important factual attributes is its very name. Its legal attributes include its status as a legal person and its contractual rights and obligations.

⁶⁶ Transcript 22 September 2020 at p 96, line 3 to p 97, line 23.

143 The plaintiff's submission is, in effect, that the purpose and significance of a name is not to point to a legal person, but to point to a concept which in turn points to a legal person, *ie*, the concept being the person liable for the wrong which the claimant is seeking compensation or the "correct" person to participate in the arbitration.⁶⁷ That is a completely unnatural use of a name, whether as a matter of ordinary language, as a matter of law or as a matter of procedure. The natural use of a name even in – indeed, especially in – a foundational document in legal proceedings is to point to a legal person. A name cannot be stripped away from the legal person to whom it belongs and to whom it points and turned into a pointer to a pointer simply on the pretext of advancing substance over form.

144 The plaintiff argues that names are less important in arbitration than in litigation because arbitration is consensual. The suggestion is, therefore, that the court ought to look at the substance of a party's consent to arbitration and less to matters of form such as a party's name.⁶⁸ In this case, the plaintiff submits, the arbitration was clearly consensual: (a) because the defendant and the plaintiff were, by reason of the 2004 mergers, both bound by the arbitration agreement in the Contract; and (b) because both the defendant and the plaintiff voluntarily participated in the arbitration.⁶⁹

145 All that may be so. But whatever the defendant may have consented to in the arbitration agreement and whoever may today hold the rights and obligations under that arbitration agreement, it remains the case, as the plaintiff accepts, that an arbitration commenced against a non-existent legal person is a

⁶⁷ Transcript 22 September 2020 at p 84, line 21–27.

⁶⁸ Transcript 22 September 2020 at p 103, lines 15–22.

⁶⁹ Transcript 22 September 2020 at p 97, lines 24–31.

nullity, unless the use of the non-existent legal person's name is merely a misnomer. And even then, a finding of misnomer means merely that the misnomer can be corrected within the proceedings itself. As I have found, the use of Hydralift's name was not a misnomer. And even if it was, the plaintiff made no attempt to correct the misnomer within the arbitration. That is a sufficient ground, in itself, for setting aside the plaintiff's leave to enforce the award.

Is the plaintiff estopped by representation?

146 The third question the defendant poses (see [19] above) is whether the plaintiff is estopped from denying that the respondent in the arbitration was Hydralift. I accept the defendant's submission that the plaintiff is so estopped.

147 The three elements of estoppel by representation are a representation of fact, reliance on the representation and detriment caused by the reliance: *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [7].

148 I accept that the plaintiff represented, both in the arbitration and in the related litigation, that Hydralift existed as a legal person and that Hydralift was the respondent in the arbitration.

149 I have set out the most significant of those representations at [121]–[131] above. I now list two other representations:

- (a) The defence and counterclaim in the arbitration asserted that it was Hydralift who was bringing a counterclaim against the defendant,

not the plaintiff (see [120] above).⁷⁰ That is a representation by conduct that Hydralift is a legal person, because only a legal person is capable of asserting a counterclaim (see [66] above), and that Hydralift is the counterclaimant.

(b) In his affidavits filed in the related litigation, Mr Endal represented that he was authorised to make the affidavits on behalf of Hydralift and that Hydralift and/or its solicitors had made information and documents available to him for that purpose.⁷¹ That is a representation by words that Hydralift exists as a legal person and that it is Hydralift who is responding to the defendant's litigation. Mr Endal did also say that the plaintiff had assumed the business portfolio of Hydralift. But, for reasons I have already given, referring to an "assumption" of Hydralift's portfolio is ambiguous, particularly in light of the assertions in Mr Jensen's witness statement (see [121]–[131] above).

The plaintiff's representations to the defendant that Hydralift was the respondent in the arbitration were clear and consistent.

150 I accept the defendant's submission that it relied on the plaintiff's representations, and that it did so to its detriment.⁷² The defendant has spent substantial time and expense over the 12 years from 2007 to 2019 in prosecuting the claim and defending the counterclaim in the arbitration.⁷³

⁷⁰ JBOD vol 2 at p 636, para 18; JBOD vol 2 at pp 861 and 892.

⁷¹ JBOD vol 2 at p 1099, paras 1–2.

⁷² DWS at para 62.

⁷³ JBOD vol 3 at p 1802, para 14(a).

151 The result is that the plaintiff is now estopped from denying that Hydralift was the respondent in the arbitration.

Does the Contract prohibit a transfer of rights upon a merger?

152 The fourth question the defendant poses (see [19] above) is whether the Contract prohibits Hydralift from transferring to the plaintiff its rights against the defendant under the arbitration agreement in the Contract. The question focuses on the plaintiff's rights under the arbitration agreement because the plaintiff relied on those rights to pursue the counterclaim in the name of Hydralift against the defendant in the arbitration. And it is that counterclaim which has given rise to the award which the plaintiff now seeks to enforce against the defendant.

Norwegian law on the transfer of rights upon merger

153 The parties' experts, Mr Sveen and Mr Perland, are broadly in agreement on Norwegian law in so far as it governs this question. The following points are therefore either common ground or not seriously disputed:

- (a) A merger under Norwegian law transfers all of the assets, rights and obligations of the transferor company to the transferee company by operation of law. This is subject only to any provision in a contract between the transferor and a third party which prohibits such a transfer.⁷⁴
- (b) An attempt to transfer *obligations* to a transferee upon a merger in breach of any such prohibition will not prevent the transfer taking

⁷⁴ PWS at paras 24–26; JBOD vol 3 at pp 1729–1730, para 18; JBOD vol 3 at p 1231, para 63; JBOD vol 3 at p 1820, para 43.

effect. The obligation will nevertheless be transferred to the transferee, with the transfer giving rise to a claim for breach of contract.

(c) However, an attempt to transfer *rights* to a transferee upon a merger in breach of any such prohibition will prevent the transfer taking effect. The result is that nobody will be able to enforce the transferor’s rights under that contract.⁷⁵ The transferor will have ceased to exist and the rights will not have vested in the transferee.

154 There are only two major issues which divide the experts. First, the experts differ on the meaning of the term “universal succession”.⁷⁶ Rather than attempting to resolve this difference, I will simply avoid using the term and instead describe the substance of what is taking place at any given time.

155 Second, the experts take a different view on how to determine whether a contractual provision prohibits a transferor from transferring its rights under a given contract to a transferee upon merger. I now analyse this difference.

The defendant’s submissions

156 The defendant’s submission on this issue proceeds in four steps. First, as I have already mentioned (see [153(c)] above), an attempt to transfer rights to a transferee upon a merger in breach of a contractual prohibition will prevent the transfer taking effect under Norwegian law. Second, the effect of cl 21.1 of the Contract (set out at [162] below) is to prohibit a transfer of Hydralift’s rights under the Contract upon a merger, including its rights under the arbitration agreement. Third, there is therefore no arbitration agreement between the

⁷⁵ JBOD vol 3 at pp 1729–1730, paras 18–20; JBOD vol 3 at p 1820, para 43.

⁷⁶ JBOD vol 3 at p 1732, paras 26–28.

plaintiff and the defendant to sustain the tribunal’s award against the defendant on the counterclaim. Finally, the award is therefore unenforceable (see Art 36(1)(a)(i) of the Model Law and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [148]).⁷⁷

157 Of these four steps, the first and fourth steps are common ground. That leaves only the second and third steps for me to analyse. The defendant’s fourth question therefore resolves to only the following two issues:

- (a) What is the test for determining whether a contractual provision prohibits a transfer of rights upon a merger under Norwegian law?
- (b) Does cl 21.1, properly interpreted, satisfy that test?

I address each issue in turn.

The test

158 On the first issue, Mr Sveen, the plaintiff’s expert, advances the following four propositions:

- (a) In a merger under Norwegian law, the principle of continuity is the default rule and restricting transferability is the exception.
- (b) The principle of continuity means, in brief, that a merger under Norwegian law: (a) treats the transferee company as “continuing” the

⁷⁷ DWS at para 75.

“whole business” of the transferor company; and (b) treats the transferor company as being “carried on” in the transferee.⁷⁸

(c) A “specific basis” must exist for a contractual provision to operate as a prohibition on a transfer of rights upon a merger.⁷⁹ This requires a high threshold to be met. A “specific basis” will exist, for example, if the provision specifically prohibits a transfer of rights upon a merger.⁸⁰ A “specific basis” will not exist, in the absence of compelling circumstances, if the provision does not expressly refer to mergers, amalgamations, change of control or the like.⁸¹

(d) The “specific basis” requirement is a rule of Norwegian company law, and therefore applies to the prohibition on transfer in cl 21.1 of the Contract, even though the Contract is governed by Singapore law.

159 The defendant’s expert, Mr Perland, takes the position that the “specific basis” requirement does not apply to cl 21.1 of the Contract. To support this position, he advances two propositions:

(a) First, the requirement of a “specific basis” is a rule of Norwegian contract law, not of Norwegian company law. As the Contract is

⁷⁸ JBOD vol 3 at p 1731, paras 23–24.

⁷⁹ JBOD vol 3 at p 1735, para 39.

⁸⁰ JBOD vol 3 at p 1737, para 42.

⁸¹ JBOD vol 3 at pp 1737–1738, paras 43–44.

governed by Singapore law,⁸² the “specific basis” test has no application to cl 21.1.⁸³

(b) Second, the rationale of the “specific basis” requirement is not engaged by cl 21.1. The interpretation of a contract must take into account the parties’ background. Norwegian parties entering into a contract governed by Norwegian law are taken to be aware of the “specific basis” requirement and can reasonably be expected to draft their contracts with that in mind. There is, however, no reason to expect a non-Norwegian legal person, such as the defendant, contracting under Singapore law to do so, even if its contractual counterparty is a Norwegian legal person. A non-Norwegian legal person has “no encouragement to consider the issue of transfer or assignment in a merger”.⁸⁴

160 I prefer Mr Sveen’s evidence to Mr Perland’s on this first issue. As the plaintiff points out,⁸⁵ Mr Perland cites no authority for his propositions. In any event, on the first of Mr Perland’s propositions, the plaintiff’s submission is not that the “specific basis” requirement of Norwegian law “bears upon the interpretation” of cl 21.1 under Singapore law;⁸⁶ its submission is that the interpretation of clause 21.1 under Singapore law bears upon whether a “specific basis” under Norwegian law exists. There is thus no contradiction

⁸² JBOD vol 2 at p 822; PWS at para 34.

⁸³ DWS at para 81.

⁸⁴ JBOD vol 3 at p 1822, para 59.

⁸⁵ PWS at para 29.

⁸⁶ DWS at para 81.

between cl 21.1 being governed by Singapore law and yet having to meet the specific basis requirement of Norwegian law.

161 I therefore hold that the “specific basis” requirement is a rule of Norwegian company law and applies when examining the effect of cl 21.1 on a merger under Norwegian company law. Clause 21.1 nevertheless falls to be interpreted under Singapore law, as the governing law of the Contract.

Clause 21.1 of the Contract

162 Clause 21.1 of the Contract provides as follows:⁸⁷

21 ASSIGNMENT AND SUBCONTRACTING

21.1 [Hydralift] may not assign the contract or any part thereof or any benefit interest [sic] therein or thereunder and, for the avoidance of doubt and without limiting the generality of foregoing [sic], [Hydralift] may not assign any receivables or any sums due from the company under the terms of the contract.

163 Clause 21.1 of the Contract does not expressly prohibit a transfer of rights upon a merger. It expressly prohibits only assignment. The question is therefore whether a transfer of rights upon a merger comes within the meaning of the verb “assign” in cl 21.1.

164 The defendant submits that it does. For this submission, the defendant relies on *Stansell Ltd and another v Co-operative Group (CWS) Ltd* [2006] 1 WLR 1704 (“*Stansell*”). On the authority of *Stansell*, the defendant submits that “assign” means any voluntary transfer of rights.⁸⁸ Its submission is that, as a

⁸⁷ JBOD vol 2 at p 821.

⁸⁸ Transcript 22 September 2020 at p 43, lines 7–9.

merger is a voluntary act, a transfer of rights upon a merger is a voluntary transfer and falls within the meaning of “assign” in cl 21.1.

165 In *Stansell*, the English Court of Appeal accepted that the word “assign” in an anti-assignment clause connoted “an *inter vivos* disposition by one party in favour of another as an act of their joint volition” (at [64] and [66]). While I accept that *Stansell* is authority for the defendant’s submission, I have some difficulty with extending the word “assign” to cover a transfer of rights which takes place by operation of law upon a merger. No doubt that transfer of rights is the ultimate result of a voluntary act of the transferor and transferee in passing the resolutions and taking the other steps necessary to effect the merger. But it seems to me that the natural meaning of the verb “assign” requires these acts to be the direct cause of the transfer of rights and not merely an ultimate or indirect cause of the transfer. In other words, I consider that an assignment requires a voluntary act which, in itself, directly brings about the transfer of rights. That would exclude a transfer upon a merger. In a merger, it is the statute or a court order which operates in law to bring about the transfer of rights. The voluntary acts merely initiate the process and satisfy the conditions precedent for the statute or court order to operate to bring about the transfer.

166 This view of assignment is one which both the Court of Appeal and the judge at first instance rejected in *Stansell* (at [65]). This view finds some indirect support, however, in *JX Holdings*.⁸⁹ *JX Holdings* establishes that a transfer of shares by operation of law upon a merger is different in legal character from a contractual transfer by the owner of the shares (at [18]). In that case, Edmund Leow JC held that the transfer of shares upon a merger is not a “transfer” within the meaning of s 130(1) of the Companies Act but is instead a “transmission”

⁸⁹ PWS at paras 37 and 44.

(at [43(d)]). In other words, the shares vest in the transferee not as a result of “a voluntary disposition of legal title to the shares brought about by an act of the shareholder” but as a result of “an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event” (at [18]).

167 This is also the position taken in a more recent English case decided in the specific context of both merger and arbitration on facts very similar to those before me. In *A v B* [2017] 1 WLR 2030, an Indian company (P) was the claimant in an arbitration against another company (E). In the course of the arbitration, P merged with another Indian company (F) by a scheme of amalgamation under Indian company law. The amalgamation resulted in: (a) F acquiring P’s entire business as a going concern by operation of Indian law and (b) P being dissolved and ceasing to exist (at [10]–[11]). The tribunal allowed F’s application to be substituted for P in the arbitration and rendered an award in favour of F against E. E applied to the English High Court to set aside the award on the basis that: (a) the transfer of P’s rights to F upon the merger operated in English law as an equitable assignment of those rights by P to F; (b) P failed to give notice of the equitable assignment to E before P’s dissolution; and (c) the arbitration had therefore become a nullity upon P’s dissolution.

168 Sir Jeremy Cooke held (at [44]) that there is a well-established distinction in English law between a transfer of rights upon a scheme of amalgamation and a transfer of rights upon an assignment. The distinction turns on whether the rights are transferred wholesale or only by a series of particular transfers. Only a transfer of the latter type is an assignment. Further, because the distinction between these two types of transfer is familiar to English law, the court should observe that distinction when considering transfers under

foreign law, without getting bogged down in the technical question as to whether the transfers under the foreign law are considered a true universal succession in the civil law sense (at [45], italics added):

... It would be wrong to classify [the transfer of the whole undertaking of P to F] by reference to that English law concept [of equitable assignment], particularly when the wholesale form of transfer *per universitatem* in an amalgamation or merger by statute or order of the court is familiar enough in [English law]
...

169 Following Sir Jeremy’s approach, the division between the experts on the meaning of “universal succession” or transfer “*per universitatem*” is immaterial.⁹⁰ The effect of the Norwegian companies legislation was to transfer “the assets, rights and obligations” of Hydralift first to NOH and then to the plaintiff “as a whole”, as Mr Perland says.⁹¹ On the authority of *A v B*, I therefore hold that Singapore law does not consider a wholesale transfer of this type to be an assignment. As a result, Hydralift did not “assign” its rights under the Contract to the plaintiff via NOH simply by voluntarily initiating a merger which satisfied the conditions precedent for this wholesale transfer of rights by operation of Norwegian law.

170 There are two other indicators that the Contract intended to draw a distinction between what is prohibited by cl 21 and what occurs upon a merger.

171 First, the subject matter of cl 21 is both “Assignment and Subcontracting”. Subcontracting assumes that the head contractor continues to exist after entering into the subcontract. That is consistent with “assign” being

⁹⁰ DWS at paras 86–90.

⁹¹ JBOD vol 3 at p 1229, para 45.

limited to a voluntary transfer following which the transferor continues to exist. That is not what happens under Norwegian law upon a merger.

172 Second, it is of interpretive significance that cl 21.1 makes no reference to a transfer of Hydralift’s rights upon a reconstruction or amalgamation. As in *A v B* (at [18]), the Contract shows that, where the parties intended to provide for contractual consequences upon a reconstruction or amalgamation, they did so by expressly using those words. Thus, cl 13.1(c) of the Contract expressly provides that the defendant has no right to terminate the Contract on certain grounds if those grounds arise purely for the purpose of reconstruction or amalgamation. The omission of any similar reference to reconstruction or amalgamation in cl 21.1 indicates to me that that clause was not intended to prohibit a transfer of rights upon a merger.

173 For all of these reasons, I find that cl 21.1, on its proper construction under Singapore law, does not meet the “specific basis” requirement of Norwegian company law. As a result, cl 21.1 of the Contract does not prevent the 2004 mergers transferring Hydralift’s rights under the arbitration agreement to the plaintiff via NOH.

Effect of cl 21.1 on the arbitration

174 The result of my finding is that Hydralift’s rights under the Contract, and in particular its right to arbitrate a counterclaim arising from the Contract, are now vested in the plaintiff. But that does not assist the plaintiff in enforcing this award. This result means only that, if the defendant had commenced this arbitration against the *plaintiff* in 2007, the *plaintiff* would then have had a right to bring a counterclaim against the defendant and would now be entitled to enforce an award against the defendant on the counterclaim. It does not mean

that the plaintiff was in substance the respondent to the arbitration or that the plaintiff is in substance the creditor under the award.

175 I accept the defendant’s submission that, even if the plaintiff was the transferee of Hydralift’s rights under the arbitration agreement, it remains the case that the plaintiff cannot: (a) enforce an award which the tribunal intended to and did issue in favour of Hydralift; and (b) cannot enforce an award arising from an arbitration which was a nullity from the outset.⁹²

Did the plaintiff make full and frank disclosure?

176 The final question the defendant poses (see [19] above) is a procedural one. The defendant submits that leave to enforce the award should be set aside because the plaintiff did not make full and frank disclosure to the court when it applied *ex parte* for that leave.⁹³

177 It is common ground that an applicant has a duty to make full and frank disclosure to the court on an *ex parte* application of all matters which might be material to the application, and which are reasonably within its knowledge, even if those matters are prejudicial to its claim (*The “Vasiliy Golovnin”* [2008] 4 SLR(R) 994 (*“The “Vasiliy Golovnin”*”) at [83]). A matter is material to an application if the judge ought to know that matter when dealing with the application or, to put it another way, if knowing the matter will enable the judge to make an informed decision on the application, even if the matter may not be determinative or decisive (*The “Vasiliy Golovnin”* at [86] and [87]). The duty of full and frank disclosure requires applicant’s counsel to bring those material

⁹² DWS at para 64; Transcript 22 September 2020 at p 34, lines 11–18.

⁹³ DWS at paras 22, 25 and 109.

matters to the court’s specific attention (*The “Vasily Golovnin”* at [91] and [94]).

178 The defendant submits that the plaintiff failed to make full and frank disclosure of three material matters:

(a) First, the plaintiff failed to disclose the facts which establish that both the plaintiff and the defendant objectively intended the respondent in the arbitration to be Hydralift, not the plaintiff.⁹⁴ The plaintiff also failed to disclose: (i) that it had represented in the arbitration that Hydralift continued to exist as a legal person⁹⁵ and (ii) that it had made no application to the tribunal to correct Hydralift’s name in the arbitration or the award.⁹⁶ Instead, contrary to the facts, the plaintiff presented this case as a simple case of misnomer.

(b) Second, the plaintiff failed to disclose that the defendant had available to it a potential defence: that cl 21.1 of the Contract prevented a transfer of Hydralift’s rights under the arbitration agreement to the plaintiff.⁹⁷

(c) Third, the plaintiff failed to disclose that it is not the same legal person as Hydralift.⁹⁸ Instead, by describing itself in the title to this application as “National Oilwell Varco Norway AS (formerly known as

⁹⁴ DWS at para 110.

⁹⁵ Transcript 22 September 2020 at p 46, line 22 to p 47, line 8.

⁹⁶ Transcript 22 September 2020 at p 47, lines 17–21.

⁹⁷ DWS at para 111.

⁹⁸ DWS at para 112; Transcript 22 September 2020 at p 46, lines 5–12.

Hydralift AS)”,⁹⁹ the plaintiff positively misrepresented that it was the same legal person as Hydralift. Further, the plaintiff failed to disclose that it *knew* at all material times that it was not the same legal person as Hydralift, as established by its extraordinary conduct in the related litigation (see [129] above).¹⁰⁰

179 I do not accept that the plaintiff failed to make full and frank disclosure of the first and second matters. As the plaintiff submits,¹⁰¹ the duty of full and frank disclosure does not require an applicant to disclose every conceivable material fact or to anticipate and pre-empt every conceivable legal argument. The duty extends only to those facts which an applicant can reasonably ascertain and to potential defences that it can reasonably anticipate (at [87]–[88]). Even then, the duty extends only to those facts which the court would consider material, not those which the opposing party would consider material. Further, I accept that the duty to make full and frank disclosure must be assessed against what the applicant knows of the facts and of the opposing party’s likely defences at the time of the *ex parte* application, and ought not to be assessed in hindsight in light of all of the defences which the opposing party eventually raises when the application is heard *inter partes* and after exchanging affidavits.

180 Mr Jensen’s affidavit in support of the *ex parte* application quite properly drew the court’s attention to the material facts and to the defences that the defendant’s solicitors had raised up to that point in the post-award correspondence. Three pages of Mr Jensen’s 22-page affidavit are devoted to summarising and quoting key parts of the post-award correspondence in which

⁹⁹ JBOD vol 1 at p 2.

¹⁰⁰ DWS at para 112.

¹⁰¹ Transcript 22 September 2020 at p 128, lines 16–23.

each party made factual allegations and took legal positions.¹⁰² These included: (a) the defendant’s position that the plaintiff had no standing to participate in the arbitration because it was not Hydralift and because Hydralift had ceased to exist in October 2004; and (b) the plaintiff’s response that it had the necessary standing because it had succeeded to all of Hydralift’s rights and obligations.

181 I therefore find that the plaintiff did not fail to make full and frank disclosure on the first two matters.

182 On the third matter, it was and is clearly incorrect for the plaintiff to describe itself in the title to this application as having been formerly known by Hydralift’s name (see [27] above). The plaintiff suggests, on the authority of *Velstra Pte Ltd (in liquidation) v Dexia Bank NV (formerly known as Artesia Banking Corp NV)* [2004] 1 SLR(R) 653, that this is the correct way to reflect the result of a merger in the title to proceedings.¹⁰³ That case is no authority to that effect. In any event, whatever may have been done or not done in past cases, for whatever reasons, the assertion that one company was formerly known by a different name is a factual assertion. Whether the factual assertion is true or false turns on the facts, not on precedent. In this case, as I have pointed out, the plaintiff was never known at any time by Hydralift’s name.

183 Nevertheless, Mr Jensen’s affidavit supporting the *ex parte* application did disclose that the plaintiff and Hydralift were two different legal persons with two different names. As the plaintiff points out,¹⁰⁴ the first section of Mr Jensen’s affidavit disclosed expressly: (a) the entire history of the corporate

¹⁰² JBOD vol 1 at pp 21–24, para 50(a)–(l).

¹⁰³ DWS at para 96.

¹⁰⁴ Transcript 22 September 2020 at p 126, lines 8–21.

events affecting Hydralift; (b) that Hydralift was struck off in October 2004 as a result of its merger with NOH; and (c) that “the [a]cquiring company” in Hydralift’s merger with NOH was later renamed “National Oilwell Varco Norway AS”.¹⁰⁵

184 I am therefore satisfied that the plaintiff discharged its duty to make full and frank disclosure of material facts even on this third matter. This is not a ground on which to set aside the plaintiff’s leave to enforce the award.

Conclusion

185 The final result is that I have allowed the defendant’s application and set aside the plaintiff’s leave to enforce the award on three independent grounds.

186 First (see [35] above), the tribunal objectively intended to and did issue the award in favour of Hydralift, not the plaintiff. Under 19 of the Act, I have no power to allow the plaintiff to enforce an award which the tribunal did not intend to issue and did not issue in the plaintiff’s favour.

187 Second (see [115] and [133] above), both parties objectively intended to use Hydralift’s name in the arbitration to refer only to Hydralift and not to the plaintiff. Neither party therefore made any mistake as to Hydralift’s name or as to its identity. Hydralift having ceased to exist as a legal person long before the

¹⁰⁵ JBOD vol 1 at pp 7–8, paras 5–9.

arbitration commenced, the arbitration was a nullity from the outset. The award is also a nullity and cannot be the subject of enforcement under s 19 of the Act.

188 Third, the plaintiff is estopped by its representations in the arbitration and in the related litigation from denying that Hydralift was the respondent in the arbitration.

189 Costs follow the event. I have therefore ordered the plaintiff to pay the defendant its costs of and incidental to this application, such costs fixed at \$20,000. I have also ordered the plaintiff to pay the defendant its reasonable disbursements, such disbursements to be taxed if not agreed.

190 I have allowed the defendant's application with great reluctance. This arbitration took 12 long years. There was no impediment in the arbitration to the defendant presenting its case or to the plaintiff presenting Hydralift's case. Therefore, the fact that Hydralift had ceased to exist before the arbitration was commenced does not, in itself, detract from the tribunal's resolution of the parties' dispute or from the procedure which it followed in doing so. That is no doubt why the defendant did not apply to set the award aside.

191 My decision now to refuse enforcement sets to nought all of the time, money, effort and other resources which the parties and the tribunal have expended over 12 years. In addition, the limitation period for any fresh arbitration on the same claim and counterclaim has long since expired.

192 Despite all these misgivings, the logic of the defendant's case and the persuasiveness with which counsel for the defendant has presented it compels me to set aside the plaintiff's leave to enforce the award. The only consolation is that the predicament in which the plaintiff finds itself now is entirely the result

of its own extraordinary decision, sustained over 12 years, to impersonate Hydralift both in the arbitration and in the related litigation.

Vinodh Coomaraswamy
Judge of the High Court

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