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

[2022] SGHCR 9

HC/ADM 102 of 2021
HC/SUM 2171 of 2022

Between

Credit Suisse AG

… *Claimant*

And

Owner of the Vessel "CHLOE V"

… *Defendant*

Between

Owner of the Vessel "CHLOE V"

… *Claimant in Counterclaim*

And

Credit Suisse AG

… *Defendant in Counterclaim*

JUDGMENT

[Civil Procedure] – [Security for costs]

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Credit Suisse AG
v
Owner of the Vessel "CHLOE V"

[2022] SGHCR 9

General Division of the High Court — Admiralty Suit No 102 of 2021
(Summons No 2171 of 2022)
Colin Seow AR
15, 19 & 26 July, 2 & 8 August 2022

28 September 2022

Colin Seow AR:

Introduction

1 Credit Suisse AG ("the claimant") applies by way of this summons seeking an order for security for costs to be furnished by Chloe Navigation Ltd ("the defendant"), who is the registered owner of the marine vessel "CHLOE V", in respect of the defendant's counterclaim against the claimant in High Court Admiralty Suit No 102 of 2021 ("ADM 102").

Background

2 The claimant bank is, and was, at all material times the mortgagee of the "CHLOE V" in connection with a loan facility extended by the claimant to the defendant pursuant to a Facilities Agreement dated 26 June 2019 (and as

subsequently amended and supplemented on 30 August 2019 and 23 January 2020).

3 On 18 September 2021, the claimant commenced ADM 102 in the General Division of the High Court and obtained a warrant for the arrest of the vessel in Singapore. The action was pursued on the ground that six events of default had occurred under the Facilities Agreement in the period from 14 May 2021 to 14 September 2021. These events of default included the defendant's failure to:

(a) remedy a security shortfall to maintain the "minimum security value" required under the Facilities Agreement, following two valuations of the vessel carried out on 29 June 2021;

(b) top up the credit balance in the defendant's "minimum liquidity" account maintained with the claimant to a higher requisite amount in accordance with the Facilities Agreement, after the vessel became off-charter in May 2021;

(c) make payment of various other sums due and owing under the Facilities Agreement; and

(d) procure the release, within ten days in accordance with the Facilities Agreement, of the vessel from an earlier arrest initiated by the vessel's previous charterer, Koch Shipping Pte Ltd ("Koch"), in High Court Admiralty Suit No 64 of 2021 ("ADM 64").

4 The defendant entered its appearance in ADM 102 on 29 September 2021, and on 8 October 2021 the claimant's Statement of Claim was filed and served. This was followed by the defendant's filing and service of its Defence

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and Counterclaim on 4 November 2021, and the claimant's filing and service of its Reply and Defence to Counterclaim on 18 November 2021.

5 On 18 November 2021, the claimant by way of an application to a Judge ("the Judge") successfully obtained an order for the sale of the vessel. The vessel was subsequently sold by the Sheriff of the Supreme Court and the proceeds of sale were held in court.

6 On 30 December 2021, the claimant brought an application seeking summary judgment on its claim in ADM 102. The application was granted by an Assistant Registrar ("the AR") on 21 March 2022 following a hearing on the same day. The defendant filed a Registrar's Appeal against the AR's decision on 4 April 2022. The appeal was heard by the Judge on 26 April 2022, and on 18 May 2022 the Judge delivered an oral judgment dismissing the appeal. To my understanding, no further appeal has been filed by the defendant following the Judge's decision affirming the grant of the summary judgment. This leaves the defendant's counterclaim in ADM 102 outstanding and pending in the proceedings.

7 On 10 June 2022, the claimant filed the present summons seeking an order for security of costs to be furnished by the defendant in respect of the defendant's counterclaim in ADM 102. The application was heard before me on 15 and 19 July 2022, with a further round written submissions relating to an ancillary issue concerning the applicability of the Choice of Court Agreements Act 2016 (2020 Rev Ed) directed to be tendered by the parties sequentially on 26 July (by the claimant), 2 August (by the defendant) and 10 August 2022 (by the claimant). The parties tendered their further submissions accordingly, save that on 8 August 2022 the claimant's solicitors by way of a letter addressed to

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the court indicated that their client did not find it necessary to file final response submissions to the defendant's further submissions tendered on 2 August 2022.

8 Judgment was reserved and I now render my decision on the application with my reasons.

Analysis

Ancillary issue concerning the applicability of the Choice of Court Agreements Act 2016 (2020 Rev Ed)

9 In the course of oral submissions in the application, it came to my knowledge that the Facilities Agreement carries a jurisdiction agreement by way of clause 44.1, as follows:

> **44.1 Jurisdiction of English Courts**
>
> 44.1.1 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement or any non-contractual obligations connected with it (including a dispute regarding the existence, validity or termination of this Agreement) (a **Dispute**).
>
> 44.1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
>
> 44.1.3 This clause 44.1 is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.
>
> [bold in original]

10 Clause 44.1 of the Facilities Agreement appears to be an asymmetric or unilateral jurisdiction clause not uncommonly adopted in international loan and financing agreements. It subjects the defendant in the present case to the

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exclusive jurisdiction of the courts of England if it wished to pursue legal proceedings against the claimant, but not the same vis-à-vis the claimant in respect of any legal proceedings that the claimant would pursue against the defendant.

11 Taking judicial notice – in accordance with section 59(1)(a) of the Evidence Act 1893 (2020 Rev Ed) – of the Choice of Court Agreements Act 2016 (2020 Rev Ed) ("CCAA") which implements the *Convention on Choice of Court Agreements done at The Hague on 30 June 2005* ("the Hague Convention"), a question which arises is whether an asymmetric or unilateral jurisdiction clause may be regarded as an exclusive jurisdiction clause falling within the scope of the CCAA, given that the United Kingdom and Singapore are Contracting States to the Hague Convention since the time before the parties concluded the jurisdiction clause in Clause 44.1 of the Facilities Agreement. If the answer to this question is in the affirmative, a second question would arise as to whether the Singapore court, not being the chosen court, is required to stay or dismiss the defendant's counterclaim (that being the only claim pending in ADM 102), such as to render any application seeking security for costs from the defendant in Singapore court proceedings moot. In this regard, section 12 of the CCAA provides:

> **Where Singapore court is not chosen court**
>
> **12.**—(1) Despite any other written law or rule of law, if an exclusive choice of court agreement does not designate any Singapore court as a chosen court, a Singapore court must stay or dismiss any case or proceeding to which the agreement applies, unless the Singapore court determines that —
>
> (a) the agreement is null and void under the law of the State of the chosen court;
>
> (b) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;

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> (c) giving effect to the agreement would lead to manifest injustice or would be manifestly contrary in the public policy of Singapore;
>
> (d) the agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties to the agreement; or
>
> (e) the chosen court has decided not to hear the case or proceeding.
>
> (2) This section does not affect the ability of a Singapore court to stay or dismiss the case or proceeding on other grounds.

12 As mentioned earlier at [7] above, the parties were invited to present further written submissions relating to the applicability of the CCAA to clause 44.1 of the Facilities Agreement. On this, the defendant concedes that clause 44.1 falls within the meaning of "exclusive choice of court agreement" as defined in section 3 of the CCAA. However, the defendant contends that no stay or dismissal of its counterclaim should be ordered pursuant to section 12 of the CCAA, because there has been no application made by the claimant seeking such a stay or dismissal.

13 The claimant accepts that there should be no stay or dismissal of the defendant's counterclaim under section 12 of the CCAA as well, albeit on different grounds. In this regard, the claimant's primary submission is that the CCAA does *not* apply to clause 44.1 of the Facilities Agreement, because clause 44.1 does not satisfy section 3(1)(b) of the CCAA which requires a jurisdiction clause, in order to qualify as an "exclusive choice of court agreement" under the Hague Convention, to:

> … designate[], for the purpose of deciding any dispute that arises or may arise in connection with a particular legal relationship, the courts, or one or more specific courts, of one Contracting State to the exclusion of the jurisdiction of any other court.

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14 The claimant's justifications in this regard are summarised as follows:

(a) First, clause 44.1 does not designate "the courts, or one or more specific courts, of *one Contracting State to the exclusion of the jurisdiction of any other court*" (emphasis added) for the purposes of hearing any dispute arising out of the Facilities Agreement. Read as a whole, clause 44.1 admits of the possibility of having more than just the courts of one State having jurisdiction over any dispute arising out of or in connection with the Facilities Agreement, depending on whether it is the claimant or the defendant who is pursuing legal proceedings against the other.

(b) Second, the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention (2013)* published by the Hague Conference on Private International Law ("the Hague Convention Explanatory Report"), as well as Singapore's *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005*, reveal that asymmetric or unilateral jurisdiction clauses were *not* intended to be included within the scope of the Hague Convention.

15 The claimant also highlights that the English Court of Appeal in a 2020 decision (ie, *Etihad Airways PJSC v Flöther* [2022] QB 303 ("*Etihad Airways (EWCA)*") has opined in *dicta* that the Hague Convention "should probably be interpreted as not applying to asymmetric jurisdiction clauses" (see *Etihad Airways (EWCA)* at [85]). This *dicta* in *Etihad Airways (EWCA)* takes precedence over two prior English High Court *dicta* decisions suggesting otherwise (see *Commerzbank AG v Liquimar Tankers Management Inc* [2017] 1 WLR 3497 at [36]-[39] and [74] ("*Commerzbank AG*"); *Etihad Airways PJSC*

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v Flöther [2020] QB 793 at [183]-[184] and [215]-[217] ("*Etihad Airways (EWHC)*").

16 After careful consideration of the parties' submissions, I am satisfied that asymmetric or unilateral jurisdiction clauses are indeed not intended to fall within the scope of the Hague Convention (and therefore the CCAA). Although, as the English High Court decisions in *Commerzbank AG* and *Etihad Airways (EWHC)* suggest, the wording in the definition of "exclusive choice of court agreements" in Article 3(a) of the Hague Convention may potentially include asymmetric or unilateral jurisdiction clauses (see *Commerzbank AG* at [74]; *Etihad Airways (EWHC)* at [215]), I am mindful that the interpretation of international instruments (including treaties) is not to be undertaken by reference only to the text, important as no doubt it is (see, eg, *The "Sahand" and other applications* [2011] 2 SLR 1093 at [66]). In this connection, the application of the *Vienna Convention on the Law of Treaties* (23 May 1969), 1155 UNTS 331 ("VCLT") in the interpretation of treaties is not alien to the Singapore courts (see, eg, *Re Gearing, Matthew Peter QC* [2020] 3 SLR 1106 at [40]). Article 32 of the VCLT provides that:

> *Article 32*
>
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

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17 I find no difficulty regarding the Hague Convention Explanatory Report as an instructive supplementary means of interpreting Article 3(a) of the Hague Convention, having previously considered it to be a useful guide in relation to a case concerning the application of the Hague Convention for the purpose of the enforcement of an English judgment in Singapore (see *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8). Paragraphs 105 and 106 of the Hague Convention Explanatory Report are germane to the present case:

> 105 **Asymmetric agreements.** Sometimes a choice of court agreement is drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party. International loan agreements are often drafted in this way. A choice of court clause in such an agreement may provide, "Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law."
>
> 106 *It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedi*ngs. *So agreements of the kind referred to in the previous paragraph are not exclusive choice of court agreements for the purposes of the Convention.* However, they may be subject to the rules of the Convention on recognition and enforcement if the States in question have made declarations under Article 22.
>
> [emphasis in italics added]

18 In *Etihad Airways (EWCA)* at [85]-[86], Henderson LJ (with whom Hickinbottom and Newey LJJ agreed) similarly opined the following (in *dicta*):

> 85 I am prepared to proceed on the basis that the Hague 2005 Convention should probably be interpreted as not applying to asymmetric jurisdiction clauses, although I emphasise that it is unnecessary for us to decide that question, and I do not do so. A strong indication that this was the deliberate intention of the framers of the Convention is provided by the Explanatory Report of Professors Trevor Hartley and Masato Dogauchi, who in their discussion of asymmetric agreements said at para 106:

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> "It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph [i e asymmetric agreements] are not exclusive choice of court agreements for the purposes of the Convention."
>
> 86 Further support for this conclusion may be found in the Diplomatic Minutes of the Meeting of Wednesday 15 June 2005, to which we were also referred by Mr Joseph. The minutes show that a proposal by the Swiss delegate to amend the proposed definition of an "exclusive choice of court agreement" so as to make it clear that it included asymmetric jurisdiction agreement (by inserting the words "for some or all of the parties to the agreement") was debated, but found no support. The amendment was then withdrawn.

19 It is therefore clear from the preparatory work of the Hague Convention and the circumstances of its conclusion that asymmetric or unilateral jurisdiction clauses are excluded from the meaning of "exclusive choice of court agreements" in the treaty. Given also the clear illustration in paragraph 105 of the Hague Convention Explanatory Report regarding the formulation in which an excluded asymmetric or unilateral jurisdiction clause may take (see [17] above), I find myself further assured in the present case that clause 44.1 of the Facilities Agreement as drafted indeed falls outside the scope of the Hague Convention. It follows that an order for a stay or dismissal of the defendant's counterclaim cannot fundamentally even begin to be engaged under section 12 of the CCAA in the present case, irrespective of whether such an order is being applied for by the claimant or otherwise being considered by the court on its own motion.

20 Given the above analysis, it suffices for me to leave the issue concerning the applicability of the Hague Convention (and the CCAA) to asymmetric or unilateral jurisdiction clauses as determined. Any secondary issues raised (eg,

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whether section 12 of the CCAA may be invoked by the court on its own motion) are strictly speaking not necessary for my determination given the conclusion I have reached, and thus best left to be decided in a future case.

21 For completeness, I also highlight that the claimant has not advanced any alternative argument seeking a stay of the defendant's counterclaim under general law.

22 I turn now to my analysis of the claimant's substantive application seeking security for costs from the defendant in respect of the counterclaim.

Application for security for costs in respect of the defendant's counterclaim

23 The claimant seeks security for costs from the defendant pursuant to Order 23 Rule 1 of the Rules of Court (R 5, Cap 322, 2014 Rev Ed) ("Rules of Court") and/or section 388 of the Companies Act 1967 (2020 Rev Ed) ("Companies Act").

Jurisdictional threshold

24 As between the parties, it is not disputed that:

(a) The defendant is not ordinarily resident in Singapore. It is common ground that the defendant is a corporation incorporated in the British Virgin Islands. This is confirmed by Mr Alexandros Lamprinakis in paragraph 6 of his 3rd affidavit filed in the proceedings on behalf of the defendant. Mr Lamprinakis is the in-house legal counsel of the manager of the vessel and agent for the defendant. Counsel for the defendant also confirmed in oral submissions that the defendant is not ordinarily resident in Singapore.

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(b) The defendant appears to be in a state of impecuniousness. In this regard, however, Mr Lamprinakis in paragraph 11 of his same affidavit seeks to go further by stating that "[i]t is almost a certainty that the Defendant will be unable to pursue the action if the order is granted", and this is echoed by counsel for the defendant in oral submissions. While the claimant accepts that the defendant appears to be in a state of impecuniousness, it denies that an order for security for costs will prevent the defendant from pursuing its counterclaim in the action.

25 The above yields the following implications. First, the defendant is "ordinarily resident out of the jurisdiction" under Order 23 Rule 1(1)(a) of the Rules of Court. Second, there is "credible testimony" giving rise to reason for this court to believe, pursuant to section 388 of the Companies Act, that the defendant will be unable to pay the costs of the claimant if the latter is successful in resisting the defendant's counterclaim.

26 For completeness, I highlight that in relation to the applicability of section 388 of the Companies Act, counsel for the defendant has expressed doubt in his oral submissions whether the defendant is a "corporation" for the purposes of that provision. Section 388 provides:

> **Security for costs**
>
> **388.**—(1) Where a *corporation* is claimant in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the *corporation* will be unable to pay the costs of the defendant if successful in the defendant's defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
>
> [emphasis in italics added]

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27 With respect, this doubt is misconceived and can be resolved readily by reference to the definition of "corporation" in section 4(1) of the Companies Act, where the term is stated to mean "any body corporate formed or incorporated or existing in Singapore *or outside Singapore and includes any foreign company*…" (emphasis added), subject to certain exclusions which do not apply in the present case.

28 The foregoing analysis points to one conclusion: the jurisdictional threshold necessary to invoke the court's discretion to decide whether to order security for costs to be furnished has been met under both Order 23 Rule 1 of the Rules of Court and section 388 of the Companies Act.

Discretion as to whether security for costs should be ordered

29 In deciding whether the court should exercise its discretion to order a party to provide security for costs, the court will consider all the circumstances and decide whether it is just to order that party to do so, including the extent of such security to be provided. The same principles apply whether the discretion is one to be exercised under Order 23 Rule 1(1)(a) of the Rules of Court or section 388 of the Companies (see *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] 1 SLR(R) 112 at [13]).

30 In considering whether the court's discretion should be exercised to allow the grant of security for costs against the defendant, the following two key issues are engaged, based on the parties' respective cases:

(a) Whether the making of an order for security for costs will stifle the counterclaim which the defendant contends is a genuine one.

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(b) Whether there is a close overlap between the claim and the counterclaim in the action militating against the grant of an order for security for costs against the defendant.

Whether defendant's counterclaim will be stifled

31 The defendant's submission in this regard is, by and large, encapsulated in its witness Mr Lamprinakis' averments in paragraphs 11-12 of his 3rd affidavit:

> 11. The Plaintiff is clearly attempting to stifle the Defendant's genuine counterclaim by filing an application for security for costs. The Plaintiff is well aware that its application is likely to have an oppressive effect on the Defendant. It is almost a certainty that the Defendant will be unable to pursue the action if the order is granted.
>
> 12. Further, the counterclaim by the Defendant is not one without merit. I will leave it to my solicitors to make the necessary legal submissions.

32 In this connection, the quality of the defendant's counterclaim has been described by the defendant as "*bona fide* … with a reasonable prospect of success", "plausible" and "not without merit". The defendant also places reliance on aspects of the Judge's oral judgment in the summary judgment proceedings mentioned earlier (see [6] above), where the Judge reportedly expressed the view that the defendant's counterclaim "does not at this stage appear to be implausible".

33 It is useful to give more context to the defendant's counterclaim in this regard. As mentioned earlier, ADM 102 was commenced by the claimant claiming that events of default had occurred under the Facilities Agreement (see [3] above). In response, the defendant claims that it had been prevented by the claimant from entering into a fresh charterparty with Koch in respect of the

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vessel. According to the defendant, Koch had requested the issuance of a letter of quiet enjoyment in respect of the vessel ("LQE") from the claimant as a condition for the renewal of the charterparty, but the claimant declined to do so even though it knew or ought to have known that the only realistic and/or practicable way for the defendant to generate income and continue performing its obligations under the Facilities Agreement was to charter the vessel to Koch under the new charterparty. The defendant claims, in particular, that the claimant was in breach of an implied obligation to act reasonably, rationally and in good faith when exercising its discretion whether to withhold any approval which it may give under the Facilities Agreement.

34 Returning to the application before me, the claimant contends, on the other hand, that the defendant's counterclaim is not genuine to begin with, because of "a high degree of success" in its defence to the counterclaim. Chief among the arguments made in support of this contention are as follows:

(a) At or around the time when Koch requested the LQE, the defendant's controller (identified as one Mr Ghassan Ghandour) protested the request by way of an email sent to Koch's representative, stating *inter alia* that the request was "unreasonable", "unnecessary" and "untimely" because a LQE was not previously requested under the earlier charterparty and that "Koch knew that financing was already in place and [the claimant] had absolutely no obligation under the existing finance documents to agree to limit their rights under a [LQE]".

(b) When the vessel was first arrested by Koch in ADM 64, Mr Lamprinakis provided affidavit evidence in support of the defendant's challenge against that arrest, stating that there had been no LQE issued under the earlier charterparty of the vessel and this was "rightly so"

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because Koch "knew that [the claimant] would not accede to such a request".

These are argued to be inconsistent with the position now taken by the defendant in ADM 102.

35 In my judgment, I am not convinced on the arguments presented before me that the defendant's counterclaim can be said to be ingenuine or likely to fail at the outset. Wedged between the requestor and requestee of the LQE both of whom were the key bargain holders at the material time in the negotiation for a fresh charterparty of the vessel, the positions taken by the defendant when dealing with Koch and the claimant separately at the various times might not be so unfathomable from a commercial perspective. I am also mindful of the principle that the court is generally not required to embark on a detailed examination of the merits of the case, notwithstanding that the strength or weakness of the claim advanced by the party against whom security is sought may be a relevant factor for consideration (see *Ong Jane Rebecca v Pricewaterhousecoopers and others* [2009] 2 SLR(R) 796 at [22]-[23]). But more importantly, I note that the Judge in the earlier summary judgment proceedings has expressed the view that "on a *prima facie* basis, [the defendant] has done enough to raise a counterclaim which has some plausibility and which has some connection to [the claimant's] claim", even though the Judge ultimately found it insufficient to justify on further grounds granting the defendant unconditional leave to defend the claimant's claim or ordering a partial stay of execution of the summary judgment pending the determination

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of the counterclaim.[1] The Judge also held that several issues arising out of the defendant's counterclaim "cannot be decided simply based on the available affidavit evidence".[2]

36 Nevertheless, it does not necessarily follow from the analysis above that the defendant's counterclaim will be unduly stifled if an order is made requiring it to furnish security for costs to the claimant. As mentioned at [25] above, there is credible testimony giving rise to reason for this court to believe that the defendant will be unable to pay the claimant's costs if the claimant is successful in resisting the defendant's counterclaim on the merits. Considering the fact that the defendant is a corporation as opposed to a natural person (see [24(a)] above), I am reminded of the Court of Appeal's holding in *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 ("*ECRC Land*"), as follows (at [72]):

> 72 In our view, the law on security for costs is express recognition that impecunious companies do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win. When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts. This is *a fortiori* where the company in question is already in insolvent liquidation. In such cases, the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the claimant company.
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> [emphases in italics in original]

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[1] See the Judge's Notes of Evidence (18 May 2022), at pp 5-9.

[2] See the Judge's Notes of Evidence (18 May 2022), at p 4.

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37 In *Frantonios Marine Services Pte Ltd and another v Kay Swee Tuan* [2008] 4 SLR(R) 224 ("*Frantonios Marine*"), the High Court held (at [59]) that the observations in *ECRC Land* were similarly relevant to "impecunious corporations, which are not in liquidation but whose litigation is being financed by interested third parties, whoever they may be". The High Court further held that the overriding policy consideration under section 388 of the Companies Act was the corporation's ability to pay the costs of its opponent in the event that the corporation failed in its claim, and that the ability of the corporation to comply with the security for costs order when it was itself unable to provide the security "must obviously depend on the willingness of the interested parties to contribute financially to [the corporation] so that it can provide the necessary security for costs" (see *Frantonios Marine* at [63]-[65]).

38 The High Court in *Frantonios Marine* found on the facts before it that it was just to exercise its discretion to order security for costs. In doing so, the High Court considered a matrix of factors, the following two of which bear highlighting for present purposes (see *Frantonios Marine* at [63]):

(a) The past behaviour of the party against whom security was sought in refusing to comply with a number of costs orders.

(b) The ability of the same party in mustering third-party resources to pay for counsel and other court charges to continue with the court proceedings (including engaging an expert to prepare an expert report for an interlocutory application).

39 In our present case, counsel for the claimant highlighted that the defendant has not complied with any of its outstanding costs orders arising out of the earlier summary judgment proceedings before the AR and the Judge. This

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has not been disputed by the defendant. Those outstanding costs, covering both the claimant's costs in the summary judgment proceedings as well as its costs for its substantive claim in the action, amounted to an aggregate sum of S$110,000 (before disbursements).[3] I also note that the defendant does not appear to have substantive assets within Singapore or anywhere else in the world beyond some cash assets of US$5,000 currently.

40 However, despite the defendant's apparent lack of funds and assets, the evidence before me reveal that the defendant has a demonstrated ability to muster substantial financial resources to fund its dispute resolution needs, if required. By Mr Lamprinakis' own evidence adduced on behalf of the defendant in ADM 64 and referred to in the proceedings before me,[4] it was disclosed that the defendant had remitted a sum of US$7,072,852.49 pursuant to a letter of undertaking on or around 17 September 2021 into a trust account of its foreign solicitors, in order to procure the release of an alleged associated vessel, the "ALPHA", which was at the time also arrested by Koch in South Africa. This happened while the vessel involved in the present proceedings (ie, the "CHLOE V") was still under Koch's arrest in Singapore in ADM 64. The defendant even relied on those circumstances resulting in the release of the "ALPHA" to mount formal legal challenges in ADM 64 to obtain an order for the immediate release of the "CHLOE V" around the same time.[5] By these circumstances, the

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[3] The AR awarded the claimant costs of both the summary proceedings and the claim in the sum of $80,000 (before disbursements), and the Judge awarded the claimant costs of defending the Registrar's Appeal in the sum of $30,000 (before disbursements).

[4] Mr Alexandros Lamprinaki's 2nd affidavit in ADM 64 (23 September 2021) at [11]; Mr Joshua Alexander Walter's 6th affidavit in ADM 102 (11 July 2022) at [6].

[5] HC/SUM 4106/2021 in ADM 64.

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defendant appeared to be well capable of resourcing funds to finance its dispute resolution needs in at least two jurisdictions contemporaneously.

41 I pause briefly at this juncture to mention that the counsel for the defendant contends in his submissions that the release of the "ALPHA" was brought about by virtue of the actual owner of "ALPHA", and not the defendant, providing the necessary security for that release. However, I find this contention to be lacking in merit as it is wholly inconsistent with the evidence given by the defendant's own witness Mr Lamprinakis just outlined in the above paragraph. For the record, the following was what Mr Lamprinakis deposed to in his affidavit:[6]

> 11 Upon provision of security *by the Defendant* by way of a letter of undertaking dated 17 September 2021, pursuant to which *the Defendant* has remitted payment of the sum of US$7,072,852.49 into the trust account of the Defendant's solicitors, Bowman Gilfillan Inc. (the "LOU"), [Koch] applied to the High Court of South Africa for the release of the vessel "ALPHA". The High Court of South Africa ordered the release of the "ALPHA", and the "ALPHA" was released from arrest on or about 17 September 2021. …
>
> [emphasis in italics added]

42 That is not all. After the "CHLOE V" was released from ADM 64 and re-arrested in ADM 102, the defendant further appears to continue to be able to maintain its ability to muster the wherewithal to fund its litigation needs in Singapore, namely its defence against the summary judgment proceedings in ADM 102 and the prosecution of its own counterclaim in the same action. These steps in the litigation were taken by the defendant under full legal representation. Moreover, just as the claimant had engaged an experienced

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[6] Mr Alexandros Lamprinaki's 2nd affidavit in ADM 64 (23 September 2021) at [11].

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Queen's Counsel to give expert opinion in the summary judgment proceedings, so too did the defendant. This was to address English law which has been put into issue by the defendant's counterclaim alleging the claimant's breach of an implied obligation to act reasonably, rationally and in good faith when exercising its discretion whether to withhold any approval which it may give under the Facilities Agreement (see [33] above).

43 Putting all these factors together, the picture that emerges is one which is – much like in the case of *Frantonios Marine* – quite significantly at odds with the defendant's apparent lack of funds and assets. The factors demonstrate that the defendant, with the help of its controller(s) and/or shareholder(s), is capable of marshalling the financial means, when desired, to pursue and/or safeguard its dispute resolution interests in connection with the vessel "CHLOE V". I do not say this lightly, for there has been evidence drawn to my attention indicating that the defendant is in fact backed by controller(s) and/or shareholder(s) ready to inject substantial funds into the defendant so long as the defendant can be kept commercially viable.[7] The defendant's attempted rebuttal in this regard that "the ultimate shareholders of the Defendant did not offer the Defendant financial support unconditionally" and that "[t]he shareholders would have been prepared to invest additional funds in the Defendant only if the Defendant had entered into the New Koch Charterparty [which did not happen because of the claimant's refusal to issue the LQE]",[8] strikes me as self-serving.

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[7] Ms Randa Karami's affidavit in the summary judgment proceedings in ADM 102 (27 January 2022) at [18]-[24].

[8] Mr Alexandros Lamprinakis' 3rd affidavit in ADM 102 (24 June 2022) at [10].

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44 Finally, to the extent that section 388 of the Companies Act is being considered, the fact that the defendant is at the same time *also* not ordinarily resident in Singapore (see [24(a)] above) should make the grant of security for costs relatively more compelling than in a case where the party against whom security is sought is a local company (see, eg, *Frantonios Marine* at [3]).

Whether there is a close overlap between the claim and the counterclaim

45 I now address the issue whether there is a close overlap between the claim and the counterclaim in ADM 102 militating against the grant of an order for security for costs against the defendant in respect of its counterclaim.

46 In *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*"), the Court of Appeal held (at [85]) that while security for costs may generally be ordered in respect of a counterclaim, "a court will ordinarily not order security for costs in respect of a counterclaim that arises in respect of the same matter or transaction upon which the claim is founded if it is in substance the nature of a defence". As such, a "close overlap" between a claim and the counterclaim will generally militate against the granting of security for costs (see *SIC College* at [82]-[83]), and the question of substance that needs to be answered is whether the defendant is "simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own?" (see *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307 at 317, cited in *SIC College* at [85]).

47 The defendant submits that its counterclaim arises out of the subject matter of the main claim in the action and does not amount to a separate cause of action. In support, the defendant alluded to certain remarks made by the Judge

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in the earlier summary judgment proceedings, in particular where the Judge observed that the defendant's counterclaim was *prima facie* plausible and "has some connection" to the claimant's claim in the action.

48 Having perused the Judge's notes of evidence in the summary judgment proceedings, I am not convinced that the Judge's observation that the defendant's counterclaim has "some connection" to the claimant's claim is equivalent to a finding that a close overlap exists between the two. I offer three reasons for this:

(a) First, the proceedings before the Judge was not one concerning an application for security for costs. As mentioned, the proceedings before the Judge was in the nature of an application seeking summary judgment in respect of the claimant's claim. Considerations relevant to the principles applicable to a security for costs application were therefore strictly speaking not in issue before the Judge. The remarks made by the Judge in the summary proceedings must therefore be viewed in the proper context.

(b) Second, even assuming for the sake of argument that the Judge's remarks in the summary judgment proceedings do foreshadow the determination of questions now to be addressed in the claimant's security for costs application, it seems rather a stretch and indeed a strain to regard a counterclaim said to have *some* connection to a claim as *ipso facto* having a *close* overlap with the claim.

(c) Third, as mentioned before in [35] above, in spite of the Judge's remarks in the summary judgment proceedings, he ultimately found no justification to grant the defendant unconditional leave to defend the

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> claimant's claim,[9] *including* to order in the exercise of the court's general discretion a partial stay of execution of the summary judgment pending the determination of the counterclaim. The Judge concluded those proceedings by stating that there was ultimately "no justifiable basis upon which [the claimant] should be made to wait to receive the fruits of its judgment, whether in whole or in part". In my humble view, I doubt the Judge would have arrived at this conclusion if he were of the view that a *close* overlap existed between the counterclaim and the claim just because of *some* connection between the two.

49 In any event, I am also not satisfied that the defendant by its counterclaim can be said to be "simply defending" itself without "going beyond mere self-defence and launching a cross-claim with an independent vitality of its own" (see *SIC College* at [85]). As pointed out by counsel for the claimant, the claim was based on several events of default occurring under the Facilities Agreement (see [3] above), not every one of which could be said to have been directly called into issue by virtue of the defendant's counterclaim. In any case, the fact is that the claim has, by order of the Judge, already been merged into a summary judgment in favour of the claimant. No claim from the claimant is therefore pending in the action presently, much less strictly speaking anything left therein to be legally 'defended' against. As matters currently stand, and especially given the outcome in the earlier summary judgment proceedings, the defendant's counterclaim which remains pending has, even if not before, by now clearly found a life of its own in the action. Put in another way, I doubt it

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[9] The Judge declined to grant unconditional leave to defend because he found that an express term in the Facilities Agreement prevented the defendant from raising its counterclaim as a set-off in an attempt to obtain leave to defend the claimant's claim.

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can be said under these circumstances addressed to me that a grant of security for costs against the defendant would be tantamount to aiding the claimant in pursuing the main claim in the action at all (or, at the very least, anymore).

No special circumstances against the ordering of security for costs

50 By the foregoing analysis and reasoning, I find it appropriate to order the defendant to furnish security for costs in respect of its counterclaim. For completeness, I also considered if special circumstances exist in the present case rendering it unjust to order such security to be provided (see *Frantonios Marine* at [61]). I found none.

51 Counsel for the defendant, in the course of his submissions, has sought to impress upon this court that the defendant was in a sense an "involuntary plaintiff", the reasons for which stem from the claimant's failure to issue the LQE as requested by Koch. With respect, I find it difficult to understand how that amounts to a special circumstance justifying the refusal to award security for costs to the claimant. The circumstances addressed to me in this application reveal nothing extraordinary in the way in which the defendant has come to bring a counterclaim in the action. The defendant, convinced that it has a case against the claimant for failing to observe an implied obligation under the Facilities Agreement to act reasonably, rationally and in good faith when exercising its discretion to decline Koch's request for the LQE, has decided to bring the counterclaim against the claimant. This is not very much different from the many contractual claims the courts have seen. And if the defendant is otherwise suggesting that the basis for its counterclaim would not even have arisen at all if the claimant had issued the LQE, it still begs the question why this constitutes an overriding ground for me to refuse to grant an order for

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security, in spite of all the other reasons I have set out in this judgment pointing in favour of the grant of such an order.

52 The defendant has raised another argument premised on an alleged non-response by the claimant to a letter from the defendant's solicitors dated 8 June 2022, asking the claimant to provide early voluntary disclosure of "all correspondence (electronic or otherwise), documents, notes and minutes of meetings" relating to the claimant's decision-making process in refusing to issue the LQE. The defendant submits that the claimant's non-response to the request "should be a factor against ordering security for costs against the Defendant". I fail to see why that is so, given that the letter dated 8 June 2022 expressly stated that the defendant was requesting early voluntary disclosure of documents even though it accepted that the claimant "is not obliged to provide discovery at this juncture".[10]

Quantum of security for costs

53 It is well established that the court has complete discretion in the amount of the security to be provided, and will decide the appropriate sum on the basis of the circumstances of the case (see Prof Jeffrey Pinsler, *Singapore Court Practice 2017* (LexisNexis, 2017) at para 23/2/2).

54 The claimant seeks security in the sum of S$550,000 representing the estimated legal costs and disbursements needed to defend the entire counterclaim, constituted by the following sub-estimates:

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[10] See Mr Alexandros Lamprinakis' 3rd affidavit in ADM 102 (24 June 2022) at p 19.

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(a) Legal costs for general/specific discovery up to exchange of affidavits of evidence-in-chief – S$150,000.

(b) Legal costs for setting down and trial – S$260,000, on the basis of an estimated 9-days trial involving five witnesses (of which two are proposed as factual witnesses and three are proposed as experts) each for the claimant and the defendant.

(c) Legal costs for trial closing submissions – S$30,000.

(d) Disbursements – S$111,477, which include, among other things, S$40,000 for an English law expert, S$30,000 for a ship broker expert witness and S$30,000 for a ship finance expert witness.

55 The claimant avers that the defendant's counterclaim raises complex issues requiring not only English law expert opinion, but also ship broker and ship finance experts to testify on industry practices relating to LQEs.

56 The defendant, in written submissions, contends that the amount of security sought by the claimant is excessive. It argues that an estimated 3-days trial would suffice, given that the main issue in the counterclaim is confined to the claimant's decision-making process in refusing to issue a LQE. Relying on the costs guidelines provided in Part III of Appendix G to the Supreme Court Practice Directions (under the category labelled "Admiralty"), the defendant submits that a quantum in the range between S$83,000 and S$179,000 is more appropriate insofar as legal costs are concerned. As regards disbursements, the defendant argues, among other things, that it may not be necessary for the parties' English law experts to travel to Singapore to give evidence, and in any event it may well be possible for all experts involved to give evidence via video-

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communication means. The defendant also disputes the claimant's estimated S$30,000 disbursements each for a ship broker expert and a ship finance expert, arguing that the claimant has not provided any documents to support the estimated fees for these experts.

57 For completeness, I also make mention that in oral submissions, counsel for the defendant backpaddled on his written submissions by arguing that if the court finds it appropriate to award security for costs, the court should consider ordering such amount of security as is required to cover the claimant's costs up only to the stage of discovery of documents, in the sum of around S$10,000 to S$15,000. Counsel even suggested in the same breath that the court should in fact consider an adjournment of the present application until parties have completed discovery of documents. With respect, I find the defendant's change of submissions to be confusing and unhelpful. In any case, these later submissions are misconceived in my view, for it seems to me that the defendant by the change of submissions is trying to renew its attempt to obtain early disclosure of documents from the claimant, having been unsuccessful in eliciting those documents voluntarily from the claimant previously (see [52] above). I therefore dismiss these submissions.

58 Coming back to the assessment of the quantum of security, I agree that the Appendix G costs guidelines are a useful starting point from which this court can arrive at the appropriate amount to be awarded. Appendix G provides the following range guidelines for legal costs (not including disbursements) in admiralty matters:

(a) Pre-trial work (which includes pleadings, discovery and affidavits of evidence-in-chief) – S$30,000 to S$90,000.

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(b) Trial (daily tariff) – S$6,000 to S$18,000.

(c) Post-trial work (not including work carried out after judgment is obtained, such as enforcement proceedings) – Up to S$35,000.

59 I agree that the issues to be determined in the defendant's counterclaim involve an appreciable measure of legal and industry-centric complexities requiring parties' engagement of English law experts and likely ship broking and ship financing experts as well. At the same time, however, I also recognise that those issues are relatively discrete and confined in their scope. Accordingly, I consider that the appropriate estimated quantum of security to award should fall somewhere at the seven-tenths (0.7) mark within the ranges provided in the Appendix G costs guidelines.

60 In relation to the number of trial days to be factored into the assessment, I am not convinced at this point that the trial of the counterclaim necessitates a full 9-days trial as contended by the claimant. On the other hand, the defendant's 3-days estimate strikes me as too tight considering the possibility of a mix of factual and expert witnesses totalling ten witnesses in all for both parties. In my view, a 6-days trial is a safer and more moderate estimate to adopt for current purposes, and I presume for the time being that not every witness called to the stand will invariably require more than half a day each for his or her oral evidence and cross-examination. There has also been no suggestion that any witness may require language interpretation and translation services during the trial.

61 Applying the foregoing analysis, I have therefore arrived at the following estimated amounts:

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(a) S$72,000 for pre-trial work (which includes pleadings, discovery and affidavits of evidence-in-chief).

(b) S$86,400 for trial estimated to last for six days.

(c) S$24,500 for post-trial work (not including work carried out after judgment is obtained, such as enforcement proceedings).

62 This leaves me to consider the estimated disbursements to be factored in. As mentioned, the claimant submits S$111,477, which includes S$40,000 for English law expert fees and S$30,000 each for a ship broker expert witness and a ship finance expert witness (see [54(d)] above). The defendant contends that the claimant's estimated figures for the ship broker and ship finance experts are unsupported by documents (see [56] above). I agree with the defendant. The claimant's submission of an aggregate of S$60,000 for the engagement of both ship broker and ship finance experts appears to be a bare estimate. This contrasts with the claimant's submission of an estimated S$40,000 for engaging its English law expert, where details concerning the expert's hourly rate are disclosed. I thus find it appropriate for present purposes to cap the estimated disbursements relating to the claimant's engagement of its ship broker and ship finance experts at S$15,000 per expert. This brings the claimant's estimated disbursements down to S$81,477.

63 Accordingly, the fair and just estimate of the quantum of security for costs to be awarded in favour of the claimant in respect of the defendant's counterclaim is calculated at S$264,377. For simplicity, I round this figure up to S$265,000 in my final analysis.

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Conclusion

64 For the reasons explained in this judgment, I allow the application and order the defendant to provide security in the sum of S$265,000 for the claimant's costs in defending the defendant's counterclaim in ADM 102.

65 As prayed for by the claimant, the defendant is to furnish the said security either by payment into court or by providing a first-class banker's guarantee in favour of the claimant and on wording satisfactory to the claimant.

66 The said security is to be provided within 14 days after the date of this judgment, failing which the defendant's counterclaim in ADM 102 shall be stayed without the need for a further order or attendance before the court.

67 I will hear parties on their submissions relating to the costs of the application.

Colin Seow
Assistant Registrar

Mr Daniel Liang, Ms Corina Song and Ms Teo Jen Min
(Allen & Gledhill LLP) for the claimant.
Mr Thomas Tan and Ms Kashvinder Kaur
(Haridass Ho & Partners) for the defendant.

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