IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 50

Court of Appeal / Civil Appeal No 29 of 2024 and Summons No 23 of 2024

Between

COSCO Shipping Specialized Carriers Co Ltd

… *Appellant*

And

(1) PT OKI Pulp & Paper Mills
(2) COSCO Shipping Specialized Carriers (Europe) BV
(3) All other persons claiming or entitled to claim damage, loss, expense, indemnity arising out of contact between "LE LI" (IMO No. 9192674) and jetty/structure at Tanjung Tapa Pier on or about 31.05.22

… *Respondents*

In the matter of Admiralty in Personam No 50 of 2022 (Summons No 2676 of 2023)

Between

COSCO Shipping Specialized Carriers Co Ltd

… *Claimant*

And

(1) PT OKI Pulp & Paper Mills

(2) COSCO Shipping Specialized Carriers (Europe) BV

(3) All other persons claiming or entitled to claim damage, loss, expense, indemnity arising out of contact between "LE LI" (IMO No. 9192674) and jetty/structure at Tanjung Tapa Pier on or about 31.05.22

… *Defendants*

GROUNDS OF DECISION

[Arbitration — Restraint of proceedings — Foreign judicial]
[Arbitration — Agreement — Scope — Whether dispute arising for damage done by shipowner/carrier to a trestle bridge owned by the cargo shipper is a dispute "arising out of or in connection with" the contract of carriage evidenced by bills of lading]
[Civil Procedure — Injunctions — Restraint of foreign judicial proceedings]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

COSCO Shipping Specialized Carriers Co, Ltd
v
PT OKI Pulp & Paper Mills and others and another matter

[2024] SGCA 50

Court of Appeal — Civil Appeal No 29 of 2024 and Summons No 23 of 2024
Sundaresh Menon CJ, Steven Chong JCA, Belinda Ang Saw Ean JCA
5 September 2024

13 November 2024

Steven Chong JCA (delivering the grounds of decision of the court):

1 What is the ambit and scope of the phrase "arising out of or in connection with this contract"? This is a phrase commonly found in dispute resolution agreements and on the face of the express language, the parties must have intended that the agreement should cover disputes *beyond* the terms of the contract. However, the question that has vexed the common law courts (and continue to do so), is exactly how the limits of that *extended* scope ought to be delineated.

2 As we set out in greater detail below, various tests have been developed by the courts over time to *assist* the courts in this inquiry, such as what had been referred to by the Judge of the General Division of the High Court (the "Judge") in the proceedings below as the "causative connection test", the "closely knitted test" and the "parallel claims test". Yet, in examining the cases dealing with the application of these tests, it is imperative to bear in mind that they were never

intended or designed to be applied in a formulaic manner. It would be counter-productive to run the facts of any single case before the court against the entire gamut of *each* of the tests to see whether they fall neatly within one of the tests. The concern is that in doing so, there is a risk that the *true and relevant inquiry* might well be overlooked because these tests were used to process the factual matrix of the disputes in *those particular cases* in order to arrive at a decision as to whether those facts fell within or outside the scope of the parties' agreement.

3 Typically, disputes over the scope of such agreements would arise in the context of claims, cross-claims and/or counterclaims that have been brought between the contracting parties and oftentimes, some of these would be non-contractual in nature: see, *eg*, David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd Ed, 2015) at para 4.65. The court's task is to resolve the tension arising from such competing non-contractual claims in its analysis, including whether they should be heard together or separately from those contractual claims falling within the scope of the parties' dispute resolution agreement. While parties may seek to rely on the various legal "tests" developed in case law, ultimately, it is important to recognise that they are simply labels and tools developed to *assist* the courts in determining whether the claim, defence and/or counterclaim are sufficiently "connected" such that it could be said that they arise out of or are in connection with the contract.

4 In other words, the inquiry *does not* start with any presumption that the parties must have intended for all their competing claims to be decided in the same forum, because that would depend on the nature of the competing claims and the express language of the agreement as rightly observed by the Judge

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below. For this reason, we emphasise that care should be exercised to avoid over-reliance on any presumption that parties must have intended that *all* disputes are to be heard together. After all, forum fragmentation is a fact of life with dispute resolution agreements, and one must not overstate the strength of the "one-stop shop" presumption articulated in *Fiona Trust & Holding Corporation and others v Privalov and others* [2008] 1 Lloyds Rep 254 ("*Fiona Trust*") where Lord Hoffmann explained (at [13]) that:

> [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

5 As we observed in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 ("*Rals International*") at [34]:

> … the rule of construction formulated in *Fiona Trust* is *not to be applied irrespective of the context in which the underlying agreement was entered into or the plain meaning of the words.* Where there are compelling reasons, commercial or otherwise, that may displace any assumed intention of the parties that claims of a particular kind are to fall within the scope of an arbitration clause, the court should be slow to conduct the exercise of contractual construction from that starting point.
>
> [emphasis added]

If upon examining the text of the agreement and the nature of the competing claims, a claim is not within its ambit, then forum fragmentation is inevitable and the courts should not steer away from that outcome: see this court's recent decision in *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd and others* [2024] SGCA(I) 8 at [88].

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6 The dispute in this appeal, CA/CA 29/2024 ("CA 29"), arose from contracts of carriage as evidenced by nine bills of lading ("BLs"). The BLs were each subject to an arbitration agreement which stipulated that "any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore …".

7 After loading the first respondent's cargo at the port of Palembang, Indonesia, the appellant's vessel, *Le Li* ("the Vessel"), allided with the trestle bridge of the jetty from which the loading had taken place, causing extensive damage allegedly in a sum of about US$269 million. This led to several competing actions. The first respondent, who claims to be the owner of the trestle bridge, commenced a tortious claim for the damage to the trestle bridge against the appellant in Indonesia. The appellant commenced a limitation action in Singapore and applied in HC/SUM 2676/2023 ("SUM 2676") for an anti-suit injunction to restrain the first respondent from continuing with the Indonesian proceedings. Thereafter, the appellant also commenced arbitral proceedings before the Singapore International Arbitration Centre ("SIAC") against the first respondent for breaches including of the safe port warranty under the BLs. In SUM 2676, although the appellant relied on a total of four bases (some contractual and some non-contractual) in the proceedings below, on appeal, the appellant sought a contractual anti-suit injunction on the sole basis that the Indonesian proceedings were commenced in breach of the arbitration agreement.

8 The Judge below disallowed the application. We heard and allowed the appeal on 5 September 2024. In our view, the key inquiry was to ascertain the *nature* of the competing claims and the defence raised by the parties, bearing in

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mind that the Court was *not* called upon to determine the substantive merits of the claims and defence. Viewed from that perspective, it was self-evident that the common "connection" between the first respondent's tortious claim in Indonesia, the appellant's contractual defence of "errors of navigation" under the BLs, and the appellant's counterclaim for breach of the safe port warranty ultimately related to the *cause* of the allision. Once this was properly appreciated, it could hardly be denied that the respondent's tortious claim arose out of or were in connection with the BLs and was therefore subject to the arbitration agreement.

9 These are our detailed grounds.

The material facts

10 The appellant, COSCO Shipping Specialized Carriers Co Ltd, was a company incorporated in the People's Republic of China and was at all material times the owner of the Vessel, which was flagged in the People's Republic of China. The appellant was in the business of operating and managing specialised vessels under the wider COSCO Shipping group.

11 The second respondent, COSCO Shipping Specialized Carriers (Europe) BV, was a company incorporated in the Kingdom of the Netherlands and was majority-owned (51.03%) by another entity which was itself a wholly-owned subsidiary of the appellant.

12 The first respondent, PT OKI Pulp & Paper Mills, was a company incorporated in the Republic of Indonesia that described itself as being in the business of manufacturing paper pulp and paper products. One of its manufacturing facilities (the "Mill") was located in Palembang, Indonesia. The

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first respondent also claimed to own and operate a nearby port facility (the "Terminal"), which comprised a port warehouse, a jetty located approximately 2,050m offshore (the "Jetty") and a trestle bridge (the "Trestle Bridge") connecting the Jetty to the mainland. According to documents filed by the first respondent prior to its withdrawal from the Singapore limitation action proceedings, the Terminal was a purpose-built facility constructed in or around June 2020 to obviate the need for barges to travel some 92km by river to transport the first respondent's pulp and tissue products from the Mill to be loaded onto seagoing vessels. Instead, the products could be transported from the Mill by truck via the Trestle Bridge to the Jetty, and from the Jetty, the products would be loaded on board the receiving vessels berthed there.

Underlying contracts of carriage

13 By a contract of affreightment and an accompanying addendum both dated 6 April 2021 (collectively, the "Head COA"), the Vessel was chartered by the appellant (as shipowner) to the second respondent (as head charterer). The second respondent, which had been interposed into the arrangement to reap tax savings and to collect freight, was in turn the disponent owner under a back-to-back contract of affreightment dated 6 April 2021 (the "Sub COA") with the first respondent as sub-charterer. Both cl 61 of the Head COA and cl 61 of the Sub COA contained an arbitration agreement in identical terms (the "Arbitration Agreement"), as follows:

> **61) Arbitration & Governing law**
>
> This Carter Party [*sic*] shall be governed by English law and any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC)

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> for the time being in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one arbitrator to be appointed by the chairman of the [SIAC].

14 Pursuant to the COAs, the first respondent nominated the port of Palembang, Indonesia for the subject shipment. Contracts of carriage were entered into between the appellant (as carrier) and the first respondent (as shipper), evidenced by or contained in the nine BLs all dated 31 May 2022 in respect of 27,000 air-dried metric tonnes of bleached hardwood kraft pulp acacia PEFC (the "Cargo") loaded aboard the Vessel at Palembang port on 31 May 2022. The Cargo was variously destined for Changshu Port in China and Kunsan Port in South Korea. The BLs, which were in the CONGENBILL 94 form, each contained an incorporation clause (the "Incorporation Clause") on the reverse which read:

> (1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

The front of the BLs did not specify the charterparty which had been incorporated. However, nothing turns on this as it was not seriously disputed that the terms of the Head COA including the Arbitration Agreement were duly incorporated.

The Incident

15 On 31 May 2022, following completion of the loading of the Cargo, the Vessel departed the Jetty bound for the two discharge ports named in the BLs. Barely 20 minutes after the Vessel had cast off from the Jetty and as she was departing from the Terminal with the assistance of two tugs, she allided with

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the Trestle Bridge (referred to as the "Incident"). This caused a section of the Trestle Bridge spanning some 220m to collapse.

16 After the Incident, the parties entered into security negotiations but were ultimately unable to agree on the security for the first respondent's claims. On 22 June 2022, the first respondent presented the appellant with a security demand for six heads of claim totalling the sum of US$592,787,794, although the estimate was subsequently revised downwards to US$269,307,341 in the Indonesian proceedings. The Vessel departed the Terminal on or about 24 June 2022, but no agreement was at any point reached as to the security.

The competing proceedings (including the procedural history of the Singapore proceedings)

17 On 28 July 2022, the second respondent through its solicitors, JLex LLC ("JLex"), issued a letter of demand to the appellant in respect of alleged claims arising out of the Incident. By way of an email dated 3 August 2022, the appellant's solicitors, Rajah & Tann Singapore LLP ("R&T"), then informed JLex of the appellant's intention to commence limitation proceedings, and to constitute a limitation fund by way of a letter of undertaking.

18 Following from this, on 4 August 2022, the appellant commenced HC/ADM 50/2022 ("ADM 50") seeking to limit its liability arising out of the Incident to the limits as provided under the Merchant Shipping Act 1995 (2020 Rev Ed) with reference to the tonnage of the Vessel. Although the first and second respondents were both named as defendants, pursuant to the procedural rules for a limitation action as contained in O 33 r 36 of the Rules of Court 2021 (the "ROC 2021"), service of the Originating Claim was only effected on the

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head charterer (*ie*, the second respondent). It was not disputed that the first respondent was not served with the Originating Claim.

19 On 11 August 2022, the second respondent filed a Notice of Intention Not to Contest the Originating Claim. Thereafter, on 25 August 2022, the appellant filed HC/SUM 3219/2022 ("SUM 3219") seeking, among other orders, the grant of a limitation decree.

20 On 11 October 2022, the first respondent, having since been informed of the proceedings in ADM 50 and SUM 3219, filed a Notice of Intention to Contest in ADM 50 (the "NIC").

21 Shortly thereafter, on 26 October 2022, the first respondent commenced the action against the appellant in the Kayu Agung District Court, Indonesia (the "Indonesian Proceedings") for losses arising out of the Incident. The first respondent's pleaded relief *per* its Complaint filed in the Indonesian Proceedings was as follows:

> **F. Petition**
>
> Based on the above matters, the plaintiff plead with President of Kayuagung District Court and the respected panel of judges who hear and judge this case to make the following judgment on this case:
>
> 1. Declare that Kayuagung District Court has the jurisdiction to judge this case;
>
> 2. Accept and allow all claims filed by the plaintiff;
>
> 3. Declare that the defendant has committed an illegal act against the plaintiff;
>
> 4. Order the defendant to pay the plaintiff US$**269, 307,341.00** … for his material losses, plus 6% … deferred interest per year calculated from the date of registration of this case …;
>
> 5. Declare the confiscation of the defendant's collateral as legal and effective;

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> 6. Order the defendant to pay all the expenses incurred in connection with this case.

22 The appellant's and first respondent's experts in SUM 2676 both agreed that the Indonesian Proceedings concerned the substantive merits of the first respondent's claim against the appellant. Both experts also agreed that the Indonesian Proceedings were not proceedings to obtain security in support of arbitration. The first respondent's expert, Dr H. Zahrul Rabain, S.H., M.H., expressed the view that the first respondent's cause of action against the appellant in the Indonesian Proceedings was in tort, and that the first respondent's claim was not pursuant to "any alleged bills of lading and/or charterparty that may be governed by non-Indonesian law".

23 On or about 26 December 2022, the Kayu Agung District Court submitted a request for international judicial assistance for the service of the legal process to the embassy of Indonesia in Beijing. Sometime later, on or about 7 August 2023, the Complaint in the Indonesian Proceedings was served on the appellant.

24 Meanwhile, as between the appellant and the second respondent, on 26 October 2022, the appellant commenced arbitral proceedings in Singapore against the second respondent. The appellant claimed that this was "[i]n anticipation of potential claims being brought by and against the [second respondent]" and sought, in its notice of arbitration, a declaration that the appellant had not breached its obligations under the Head COA, as well as various reliefs in respect of its liability arising out of the Incident.

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25 On 24 November 2022, the first respondent filed HC/SUM 4238/2022 ("SUM 4238") seeking to contest the jurisdiction of the Singapore courts in ADM 50. In SUM 4238, the first respondent sought:

(a) a declaration that the Singapore courts had no jurisdiction to hear the action in ADM 50;

(b) a declaration that the Originating Claim in ADM 50 had not been duly served on it, which was later withdrawn by the first respondent since it was not disputed that the Originating Claim had not been served on OKI (see *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others* [2024] 3 SLR 807 ("*COSCO (Jurisdiction)*") at [13]); and

(c) a declaration that the second respondent was not a proper defendant in ADM 50 and should be removed from the action ("OKI's Prayer 3").

26 The Judge dismissed SUM 4238 on 22 May 2023 and issued his judgment in *COSCO (Jurisdiction)* on the same day, and determined the issue of costs on 3 July 2023. Among other matters, the Judge was satisfied that the second respondent had been validly served with the Originating Claim in Singapore; that the second respondent had also submitted to the jurisdiction of the Singapore courts; and that given the first respondent's failure to argue or demonstrate an abuse of process, the Judge considered that it was not necessary for the court to decide if the first respondent had submitted to the jurisdiction of the Singapore courts: *COSCO (Jurisdiction)* at [63]. No appeal was filed against the Judge's decision in SUM 4238 within the time limited for appealing.

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27 Thereafter, on 28 July 2023, the first respondent applied by way of HC/SUM 2302/2023 ("SUM 2302") for leave to withdraw its NIC, which application was contested by the appellant.

28 The Assistant Registrar (the "AR") granted the first respondent's application in SUM 2302 on 15 September 2023. On 16 September 2023, the first respondent filed the Notice of Withdrawal of its NIC.

29 By way of HC/RA 197/2023 ("RA 197") filed on 18 September 2023, the appellant appealed against the whole of the AR's decision in SUM 2302. The Judge heard RA 197 on 25 September 2023 and dismissed it on the same day. In RA 197, among other matters, the Judge held:

(a) the first respondent was entitled to voluntarily file its NIC on 1 October 2022 even though it had not been served with the Originating Claim;

(b) furthermore, the first respondent's act of filing the NIC, in and of itself, could not amount to a submission to jurisdiction;

(c) OKI's Prayer 3 (at [25(c)] above) did not amount to an application to strike out the action against the second respondent and therefore did not amount to a submission to jurisdiction by the first respondent; and

(d) the evidence did not demonstrate that the first respondent had abused or was abusing the court's process.

30 On 25 August 2023, the appellant – having since been served with the Complaint in the Indonesian Proceedings – applied by way of SUM 2676

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seeking primarily an anti-suit injunction to enjoin the first respondent from pursuing the Indonesian Proceedings.

31 The application in SUM 2676 and supporting affidavits were electronically served on the first respondent through the first respondent's solicitors, Clasis LLC ("Clasis"), on 4 September 2023, *prior* to the first respondent's withdrawal from the action on 16 September 2023. By the time the Judge heard SUM 2676 on 27 September 2023, the first respondent was no longer a party to the proceedings (although it had previously filed affidavits and submissions in response to SUM 2676, without prejudice to its jurisdictional challenge and application to withdraw its NIC). Accordingly, the Judge heard SUM 2676 as though it were an *ex parte* application. Before the Judge and before us in the appeal, the second respondent, who was represented by JLex, attended the hearings but otherwise did not play any active role in SUM 2676.

32 Thereafter, on 19 September 2023, the appellant commenced arbitration against the first respondent before the SIAC in Singapore (the "SIAC Arbitration"). In that arbitration, the appellant has sought as against the first respondent declarations of non-liability and various reliefs in respect of the appellant's liabilities and losses arising out of the Incident. The notice of arbitration was served subsequent to the supporting affidavit for SUM 2676. At the time of the hearing of the appeal before us, an arbitral tribunal had yet to be constituted in the SIAC Arbitration as the first respondent had filed an objection under Rule 28.1 of the SIAC Rules 2016 (the "Rule 28.1 Objection") before the Court of Arbitration of the SIAC. At the hearing of CA 29 before us on 5 September 2024, counsel for the appellant, Mr Toh Kian Sing SC ("Mr Toh"), informed the Court that the SIAC Registrar had directed that the SIAC Court of Arbitration would defer its determination of the Rule 28.1 Objection until after

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the Court of Appeal had determined the appeal in CA 29. Mr Toh also confirmed that the first respondent's Rule 28.1 Objection was limited only to the issue of scope, *ie*, that the claim fell outside the scope of the Arbitration Agreement.

33 At this juncture, it was also relevant to note that the appellant's case which it stated was reflected in its Notice of Arbitration in the SIAC Arbitration was that the allision was caused by:

(a) The first respondent's breach of the safe port warranty ("Safe Port Warranty") under the Head COA as incorporated into the BLs. In this regard, the appellant referred to Box 6 of the Head COA, as reproduced below:

> **6. Loading Port(s) or Range(s)(Cl)**
>
> Oki Sea Port, Palembang, Indonesia 1SP 1SB charterers' option to load at Sungai Pakning anchorage for handy size or smaller vessel

(b) Negligent navigation, which constituted a contractual defence under cl 63 of the Head COA as incorporated into the BLs, or alternatively, under Article IV Rule 2(a) of the Hague-Visby Rules as incorporated *vide* cl 63 of the Head COA and in turn incorporated into the BLs (referred to interchangeably as the "Negligent Navigation Defence"). Clause 63 of the Head COA read:

> **63) MUTUAL RISK MITIGATION AND ESCAPE CLAUSE**
>
> Notwithstanding anything else contained in this Contract to the contrary … errors of navigation throughout this Contract, always mutually excepted
>
> …

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> This Contract, and all bills of Lading issued in respect of any shipment hereunder, shall incorporate the terms of the International Convention for the Unification of certain rules relating to Bills of Lading signed at Brussels on 25 August 1924 as amended by the Protocol signed at Brussels on 23 February 1968, as further supplemented and amended by the SDR Protocol Signed at Brussels on 21 December 1979, which terms shall prevail in the event of conflict with any provisions contained in this Contract.
>
> Owners ‘liability to the cargo damage shall be based on Hague-Visby rules.
>
> …

34 As regards the quantum of the first respondent's claim, the appellant sought to rely on cl 66 of the Head COA as incorporated into the BLs which read as follows:

> … Except if otherwise expressly established in this Contract, Charterer shall not be liable for any indirect damages, punitive damages, consequential damages and loss of profit. Owner shall not be liable for any indirect damages, punitive damages, consequential damages and loss of profit …

35 The Judge heard SUM 3219 on 5 October 2023 and granted the appellant the limitation decree it sought, albeit on amended terms.

36 On 27 December 2023, the Judge dismissed SUM 2676 and provided oral reasons for his decision. The appellant subsequently wrote in on 10 January 2024 to request the Judge to hear further arguments pursuant to O 18 r 28 of the ROC 2021 (the "FA Request"). The Judge allowed the FA Request and heard the further arguments on 7 February 2024 (the "FA Hearing"), and reserved judgment. On 28 March 2024, the Judge affirmed his earlier decision to dismiss SUM 2676 and issued the full grounds of his decision in *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills*

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and others [2024] SGHC 92 (the "GD"). The Judge made no order as to the costs of SUM 2676 and the FA Hearing.

37 Thereafter, on 11 April 2024, the appellant filed CA/OA 7/2024 ("OA 7") seeking permission to appeal against the order made by the Judge on 28 March 2024. On 30 April 2024, this court allowed the application in OA 7 and granted permission to appeal on the two questions set out at [54] below. Additionally, the Court ordered that the costs of OA 7 was to be in the cause of the appeal.

38 On 14 May 2024, the appellant filed CA 29 appealing against the decision of the Judge to dismiss SUM 2676. The appellant also filed CA/SUM 23/2024 ("SUM 23") seeking permission to adduce further evidence at the hearing of and/or for the purpose of determining the appeal in CA 29. The second respondent did not object to SUM 23. The further evidence related to three categories of documents:

(a) first, the documents including pleadings filed by the parties in the appellant's jurisdictional challenge in the Indonesian Proceedings;

(b) second, the decision of the Kayu Agung District Court on the jurisdictional challenge, holding that it had no jurisdiction to hear the Indonesian Proceedings ("Kayu Agung DC Decision"); and

(c) third, the decision of the Palembang High Court on the first respondent's appeal against the Kayu Agung DC Decision, reversing the Kayu Agung DC Decision, holding that the Kayu Agung District Court had jurisdiction over the Indonesian

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Proceedings and ordering that the Kayu Agung District Court open the trial, proceed with the examination of the case on the merits and send its findings to the Palembang High Court.

The decision below

39 Before the Judge, the appellant advanced four grounds in support of its application for an anti-suit injunction:

(a) the first respondent had commenced the Indonesian Proceedings in breach of an arbitration agreement;

(b) the first respondent had commenced the Indonesian Proceedings in breach of an exclusive jurisdiction agreement in favour of the Singapore courts;

(c) the Indonesian Proceedings were vexatious and oppressive; and

(d) the Indonesian Proceedings threatened the integrity of the Singapore courts' processes, jurisdiction, and judgments.

40 The appellant's submissions in the court below and the Judge's decision are set out in detail in the GD. As the appeal in CA 29 pertains solely to the first ground premised on the breach of an arbitration agreement, it suffices for us to briefly summarise the Judge's decision in respect of that ground.

41 The Judge accepted that where it was unclear which charterparty the Incorporation Clause referred to, the court should presume that the terms of the head charterparty were incorporated, such that cl 61 of the Head COA (*ie*, the Arbitration Agreement) was incorporated into the BLs: GD at [38] and [39]. The Judge also held that it could not be seriously disputed that the first

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respondent's claim was characterised as a pure tort claim, regardless of whether Singapore law, Indonesian law or English law was applied to dispose of that question. It was also not seriously argued that the first respondent had any contractual claims against the appellant under the BLs in respect of the Incident: GD at [42]–[43], [45], [48]–[49] and [96].

42 Next, referring to the approach taken by the Deputy High Court Judge in *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] 1 WLR 5475 ("*The Pola Devora*"), the Judge affirmed that a tort claim may be said to arise "in connection with" the charter "where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom" (referred to by the Judge as the "Causative Connection Test"): GD at [61] and [63]. The Judge also considered that the alternative tests referred to by the appellant were either inapplicable or unworkable *vis-à-vis* the first respondent's claim which could not be recast as a claim for breach of the contract of carriage evidenced by the BLs (see [75]–[77] below).

43 Turning to address the relevance of contractual defences to the tort claim, the Judge held that in deciding whether court proceedings have been brought by a party in breach of an arbitration agreement, the analysis ought to proceed in the following two steps (GD at [74] and [94]):

(a) first, the court must determine what are *the matters* which the parties have raised or foreseeably will raise in the court proceedings; and

(b) second, the court must determine *in relation to each such matter* whether it falls within the scope of the arbitration agreement.

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In this regard, the Judge's approach appeared to have been influenced by the jurisprudence on the scope of the term "matter" under arbitration legislation – which typically lays down a statutory mandate that any dispute concerning a "matter" which is the subject of an arbitration agreement governed by the relevant arbitration legislation is to be resolved by arbitration – such as the decision of the UK Supreme Court in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32 ("*Mozambique*"). We refer to this as the "matter" jurisprudence and discuss its applicability to the present inquiry below.

44 Going one step further from the two-step analysis set out in *Mozambique*, the Judge further held that at the second of the two steps (*ie*, [43(b)] above), the relevant *matters* – which included identified and foreseeable defences – must be considered (a) alongside each other; and (b) against the backdrop of all the relevant terms and contractual terms: GD at [94]. In this regard, in determining the true significance of an asserted defence, the Judge distinguished between the following two distinct lines of inquiry (GD at [75] and [76]):

(a) first, how far the existence of a contractual defence could be taken to suggest that *the principal claim* was a "matter" objectively intended by the parties to come within the scope of the arbitration agreement; and

(b) second, whether the defence (or foreseeable defence) was *itself* a "matter" falling within the scope of the arbitration agreement.

We deal with the Judge's imposition of the two distinct lines of inquiry in relation to the significance of an asserted defence at [95]–[98] below.

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45 Applying the principles in *The Pola Devora*, the Judge held that there was no basis to conclude that the tort claim was "causatively connected" in any meaningful sense to any legal relationship established under the BLs between the appellant *qua* carrier and the first respondent *qua* shipper: GD at [98], [102] and [115]. The Judge also held that no shipowner/jetty-owner relationship was constituted under the BLs: GD at [102]. The Judge thus concluded that the presumptive inference was that the parties could not have intended for the tort claim to be covered by the Arbitration Agreement.

46 Turning to address the significance of the appellant's identified contractual defences and cross-claim, first, the Judge considered the extent to which these could indicate that *the tortious claim* was a matter that was intended to be resolved by arbitration:

> (a) On the first respondent's alleged breach of the Safe Port Warranty, the Judge considered that the Safe Port Warranty could not shed any light on the parties' objective intentions as regards possible allision claims: GD at [119].
>
> (b) On the exclusion of liability under cl 66 of the Head COA, the Judge considered that cl 66 was a generically worded exclusion clause and there was "nothing special" about the clause to suggest that liability for damage caused by an allision was within the parties' contemplation at the time of contracting: GD at [120].
>
> (c) As regards the Negligent Navigation Defence, the Judge expressed the view that cl 63 did not communicate any objective intention of the parties to contractually allocate the risk of allision damage to property *other* than the ship or cargo. In any event, even if it

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turned out that Art IV r 2(a) of the Hague-Visby Rules or the express exception in cl 63 could be profitably raised, the Judge considered that the language of neither contractual defence supported the inference that the tortious claim arising from the allision was one that the parties contemplated and intended to settle pursuant to the Arbitration Agreement: GD at [123].

47 Second, the Judge considered the question of whether the defences and cross-claim were *themselves* matters falling within the scope of the Arbitration Agreement:

(a) The Judge considered that the asserted defences under cll 63 and 66 were "subordinate issues" that the parties could not have intended to refer to arbitration separate from the resolution of the principal claim, citing the decision in *Mozambique* (at [106]–[107]): GD at [126].

(b) Although the Judge accepted that the Safe Port Warranty constituted a dispute that the Arbitration Agreement was intended to cover, he ultimately concluded that the appellant's collateral claims relating to the Safe Port Warranty were *not* weighty enough to displace the conclusion that the tortious claim was not one that the parties objectively intended to refer to arbitration: GD at [128].

48 It may thus be seen that the Judge adopted a highly granular approach in assessing the significance of the identified contractual defences and/or cross-claim raised in the dispute.

49 In the circumstances, the Judge held that there was no breach of the Arbitration Agreement and declined to grant the contractual anti-suit injunction.

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On costs, at the appellant's request, the Judge made no order on costs: GD at [189].

The appellant's arguments

50 The appellant submitted that the Court should adopt a two-stage approach in determining whether an anti-suit injunction should be granted on the basis of an arbitration clause, similar to the approach adopted by the Singapore and English courts in relation to stay applications under arbitration legislation. The two stages are:

(a) the Court should first determine what are the matter(s) or dispute(s) in the foreign court proceedings; and

(b) it must then ascertain whether such matter(s) or dispute(s) fall within the scope or ambit of the arbitration clause.

51 At the first stage, *ie*, the identification of the matter(s) or dispute(s), the appellant submitted that this entailed examining *the cause(s) of the Vessel's allision.* The appellant contended that the allision was caused by the breach of the first respondent's Safe Port Warranty incorporated into the contracts as evidenced or contained in the BLs, or alternatively, negligent navigation, being a defence under those contracts. The first respondent's position was that the allision was caused by the Master's negligence in manoeuvring the Vessel. According to the appellant, the issue of causation thus goes to the heart of the claim.

52 Having so identified the "matter" or "dispute", at the second stage, the appellant submitted that the "matter" or "dispute" fell within the scope of the Arbitration Agreement because it had a sufficient connection with the contract

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in which the arbitration clause is found. According to the appellant, such sufficient connection was demonstrated by the fact that it satisfied the "Closely Knitted" test and the "Causative Connection" test, being two (alternative and non-exhaustive) formulations which would assist the court in deciding the scope issue:

(a) First, the "Closely Knitted" test was satisfied. Similar to the situation in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 ("*The Angelic Grace (CA)*"), in the present case, the Incident occurred at the load port right after loading operations, and arose during the performance of the contractual adventure. Furthermore, the tort claim, safe port claim and Negligent Navigation Defence all arose out of the exact same Incident, *ie*, on the same facts. The appellant also submitted that the competing causes were "closely knitted" in that the tort claim could not be resolved without addressing the appellant's cross-claim for breach of the Safe Port Warranty and the Negligent Navigation Defence. There were also competing causes as a matter of law in that a finding that the Incident could have been avoided by ordinary good navigation and seamanship would preclude a finding that the port was unsafe.

(b) Second, the appellant also submitted that the tortious claim arising out of the Incident was in a meaningful sense causatively connected with the relationship created by the underlying contracts of carriage. The appellant submitted that the Judge erred in drawing a distinction between a party's contractual capacity and its capacity as the owner of the property damaged during the performance of the contract. Furthermore, the relationship envisaged by the contracts of carriage was

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a long-term logistical arrangement which, the appellant contended, contemplated the first respondent's various capacities as cargo owner, mill owner and jetty owner.

(c) The appellant also submitted that the Judge wrongly concluded that the Negligent Navigation Defence did not apply to the contracts of carriage and therefore fell outside the scope of the Arbitration Agreement. The appellant submitted that the merits of the defence fell squarely within the province of the arbitrator. Furthermore, the appellant submitted that the Negligent Navigation Defence encompasses claims for damage to property other than the subject cargo, citing the decision of the English Court of Appeal in *Seven Seas Transportation Ltd v Pacifico Union Marina Corporation (The "Satya Kailash" and "Oceanic Amity")* [1984] 1 Lloyd's Rep 588 ("*The Satya Kailash*") at 597.

Issues to be determined

53 The issues that arose for our determination in CA 29 were:

(a) first, what are the matter(s) or dispute(s) which the parties have raised or foreseeably will raise in the foreign court proceedings; and

(b) second, whether such matter(s) or dispute(s) fall within the scope and ambit of the Arbitration Agreement.

54 In the course of determining these issues, we addressed the question of the relevance of the "matter" jurisprudence in cases such as *Mozambique* and *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeal*

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[2016] 1 SLR 373 ("*Tomolugen*") for the purposes of the inquiry in the present case which, strictly speaking, concerned the *contractual* interpretation of the scope of the parties' arbitration clause outside the context of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"). We also addressed the question regarding the correct test to be applied to determine whether there was a "dispute arising out of or in connection with" the contract between the parties where there was a contractual defence or reasonably foreseeable contractual defence to the tortious claim; and/or where there was a contractual cross-claim which arose from the tortious claim.

Our decision

SUM 23

55 The appellant acknowledged that the documents it sought to "adduce" in SUM 23 were the judgments of the Indonesian courts on the appellant's jurisdictional challenge in the Indonesian Proceedings as well as some of the cause papers that were filed therein. Pertinently, it was not the case that the appellant was suggesting, or for that matter could suggest, that the decisions of the Indonesian courts were binding on this court in respect of any factual controversy arising in the present case.

56 In CA/CAS 1/2023 (CA/SUM 10/2023) *The Republic of India v Deutsche Telekom AG* ("CAS 1"), the appellant in that case similarly sought to adduce further evidence comprising a judgment delivered by the High Court of Delhi (the "DHC Judgment") concerning different parties in a different arbitration than that which formed the subject of CAS 1. This court declined to make any order in respect of the summons to adduce further evidence or as to costs. This court considered that the appellant was free to make reference to the

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DHC Judgment for any bearing that the DHC Judgment might have had on the legal issues and arguments in CAS 1, and it was neither necessary nor appropriate to admit it into evidence (see also, *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [36]).

57 We likewise considered that there was no reason why reference could not be made to the Indonesian judgments where appropriate, without the need to admit the judgments into evidence. At the hearing, we declined to make any order in respect of SUM 23.

The Court's jurisdiction and power to grant the anti-suit injunction

58 The source of the Court's power to grant a permanent anti-suit injunction stems from s 18(2) read with para 14 of the First Schedule of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA"): see *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [43]. In that case, Belinda Ang J (as she then was) rightly recognised that para 14 of the First Schedule gives the court the wide-ranging power to "grant all reliefs and remedies at law and in equity", which necessarily includes the equitable remedy of a permanent injunction. On appeal, this court allowed the appeal against the grant of the anti-suit injunction but made no comment on the source of the court's power to issue a permanent anti-suit injunction: *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels (SGCA)*"). Nonetheless, a similar position was adopted by this court in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629 at [64], in the context of the issue of whether a "final" Mareva injunction could be granted in support of foreign arbitral proceedings.

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59 For the sake of completeness, we would mention that apart from the court's power to grant a permanent anti-suit injunction under s 18(2) read with para 14 of the First Schedule of the SCJA, the court also has power under s 12A(2) read with s 12(1)(*i*) of the IAA to grant an *interim* injunction in relation to an arbitration to which Part 2 of the IAA applies, subject to s 12A(6) providing that the court is to make an order "only if or to the extent that the [arbitral tribunal] has no power or is unable for the time being to act effectively". However, the anti-suit injunction sought in the present case was not on an interim basis.

60 In the court below, jurisdiction to grant the anti-suit injunction was not challenged by the first respondent (prior to its withdrawal from the proceedings). In any event, the grant of an anti-suit injunction is a personal remedy and as long as the court has personal jurisdiction over the anti-suit respondent, the court would have jurisdiction to grant the anti-suit injunction. It bears mention that an anti-suit injunction is directed not against the foreign court but against the party so proceeding or threatening to proceed: *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others* [2022] 3 SLR 103 at [45(c)]. In the present case, we were satisfied that personal jurisdiction over the first respondent was clearly established having regard to the parties' choice of Singapore as the seat. As set out at [13] above, the Arbitration Agreement provided that disputes "arising out of or in connection with this Contract … shall be referred to and finally resolved by arbitration in Singapore". In this connection, we held in *BNA v BNB and another* [2020] 1 SLR 456 at [65] that:

> … where parties specify only one geographical location in an arbitration agreement, and particularly where, as here, the parties express a choice for "arbitration in [that location]", that

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> should most naturally be construed as a reference to the parties' choice of seat.

As explained in [61] below, an agreement to submit to the supervisory jurisdiction of the Singapore court or the parties' choice of Singapore as the seat would also be sufficient to provide the basis to obtain permission for service out of jurisdiction under O 8 r 1(1) of the ROC 2021 read with para 63(3)(r) of the Supreme Court Practice Directions 2021; see also *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 ("*Westbridge Ventures*") at [74]. That said, as stated in [31] above, service of the application in SUM 2676 and supporting affidavits was electronically effected on the first respondent through the first respondent's solicitors, Clasis, on 4 September 2023, *prior* to the first respondent's withdrawal.

61 Given the parties' express choice, the seat of the arbitration was Singapore and the choice of seat embodied the parties' submission to the curial jurisdiction of the seat's court: per s 16(1)(*b*) of the SCJA; see also *CXG and another v CXI and others* [2024] 3 SLR 1282 at [32]–[33]; *Westbridge Ventures* at [73]. It bears repeating that the choice of seat is the place where (legally, even if not physically) the arbitration agreement is to be performed. Where there has been an express choice of seat, the agreement to a seat *also* constitutes an agreement that the curial law and courts of a particular country will exercise control over an arbitration seated in that country to the extent provided for by that country's law: *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 ("*Enka (UKSC)*") at [68]. In *Westbridge Ventures*, the defendant did not reside in Singapore and was party to an arbitration agreement which envisaged arbitration seated in Singapore. In the context of a leave application for service out of jurisdiction having already been granted, and the cause papers already having been personally and validly served on the

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defendant, the High Court held at [73] that the defendant had also *by the arbitration agreement* agreed to submit to the supervisory jurisdiction of the Singapore court as the seat court and that:

> [s]uch supervisory jurisdiction is not limited to merely supervising the actual arbitral process but includes the jurisdiction to supervise the conduct of a party to a contract and compelling, if necessary, that party to comply with its contractual obligations to resolve disputes with its counterparty in Singapore in accordance with the contractually agreed dispute resolution mechanism.

62 Likewise in *Enka (UKSC)*, Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) considered it fundamental that "by choosing a seat of arbitration the parties are choosing to submit themselves to the supervisory and supporting jurisdiction of the courts of that seat over the arbitration" (at [174]).

63 In *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA, The Front Comor* [2007] UKHL 4 at [18]–[19], Lord Hoffmann observed:

> 18. Of course arbitration cannot be self-sustaining. It needs the support of the courts; but, for the reasons eloquently stated by Advocate General Darmon in *The Atlantic Emperor*, it is important for the commercial interests of the European Community that it should give such support. Different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.
>
> 19. The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J did in this case: see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846. It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court … it saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction

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> … and so little as to lead to a default judgment. That is just the kind of thing that the parties meant to avoid by having an arbitration agreement.

64 In the same case, Lord Mance stated at [29]–[30]:

> 29. The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. Experience as a commercial judge shows that, once a dispute has arisen within the scope of an arbitration clause, it is not uncommon for persons bound by the clause to seek to avoid its application. Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed – and, I would emphasise, carefully applied – tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements.
>
> 30. It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being – however clearly – disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid.

65 The authorities thus firmly establish that a well-recognised feature of the supervisory and supporting jurisdiction of the seat court is the grant of injunctive relief to restrain a party from breaching its obligations under the arbitration agreement by bringing claims which fall within that agreement in court proceedings rather than in arbitration: see also, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis Singapore, 2022 Reissue) at para 75.186.

66 We observe at this juncture that the analysis for a contractual choice of seat as amounting to submission to its curial jurisdiction does not strictly apply in the context where the seat has been selected by the arbitral tribunal notwithstanding the parties' consent to the tribunal's administrative choice.

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Nonetheless, this would be a question more appropriate to be decided when the issue arises in a future case with the benefit of full submissions.

General principles on the grant of anti-suit injunctions

67 The general principles governing the grant of an anti-suit injunction are well-settled and were aptly summarised by the Judge at [28]–[30] of the GD. We do not propose to repeat the principles save to note, as the appeal relates solely to the ground that the Indonesian Proceedings were brought in breach of the Arbitration Agreement, that in cases involving an arbitration agreement it would suffice to show that there was a breach of such agreement, and anti-suit relief would ordinarily be granted unless there are strong reasons not to: *Sun Travels (SGCA)* at [68]. There would be no need to adduce additional evidence of unconscionable conduct in such cases. However, this would be subject to the important and overriding caveat that the anti-suit injunction ought to be sought promptly and before the foreign proceedings are too far advanced: *Sun Travels (SGCA)* at [68], [78] and [81]–[87].

The scope of "arising out of or in connection with"

The two-stage test

68 We agreed with the appellant's submission on the two-stage test which was largely in line with the general approach of the Judge below (GD at [74]; see also *Mozambique* at [72]):

(a) at the first stage, the court should first determine what are the matter(s) or dispute(s) which the parties have raised or foreseeably will raise in the foreign court proceedings (the "Identification Issue"); and

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(b) at the second stage, the court must then ascertain whether such matter(s) or dispute(s) fall within the scope and ambit of the arbitration clause (the "Scope Issue").

69 The two-stage test presented a sensible and principled approach and tracked the approach this court adopted in *Tomolugen* in the context of a stay application under s 6 of the IAA. There was also general international consensus on the applicable principles under the two-stage test (see *Mozambique* at [71]–[77]). For the reasons we now turn to discuss, we were satisfied that a unified approach should be adopted in considering the "matters" in dispute whether in the context of a stay or an anti-suit injunction application.

Unified approach in considering the "matters" jurisprudence

70 In examining the ambit of the arbitration clause, we think that the approach for a stay under s 6 of the IAA and an anti-suit injunction should be essentially the same. While the effect might be different in the sense that the stay would relate to domestic proceedings whereas an anti-suit injunction would indirectly affect foreign proceedings, they are both predicated on the same breach of the parties' agreement to arbitrate.

71 Broadly speaking, the "matter" jurisprudence includes the well-accepted principle that in approaching the Identification Issue, the court must ascertain the *substance* of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but "not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means": *Mozambique* at [73]; *Tomolugen* at [125]–[127]. The exercise also involves a consideration of the defences, if any, which may be skeletal (as the defendant would be seeking a reference to arbitration),

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and all reasonably foreseeable defences to the claim or part of the claim: *Mozambique* at [73] and [75]. In this regard, we echo the statements of Andrew Smith J in *Lombard North Central plc v GATX Corporation* [2012] 1 Lloyd's Rep 662 at [14] that the court must consider the underlying basis and true nature of the issue or claim (as cited by this court in *Tomolugen* at [125]):

> … The question of course depends upon the nature of the claim (or claims) made in the legal proceedings, but not, I think only on the formulation of it (or them) in the claim form and any pleadings. That would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded …

72 In our view, it is useful to bear in mind that an application for an anti-suit injunction is often made at a preliminary stage before any substantive defence has been filed, and that an application for a stay under s 6 of the IAA must be made "at any time after filing and serving a notice of intention to contest or not contest and before delivering any pleading (other than a pleading asserting that the court does not have jurisdiction in the proceedings) or taking any other step in the proceedings": per s 6(1) of the IAA. Therefore, regard must be had not only to the formulation of the pleaded claims in the foreign proceedings but also the defences or reasonably foreseeable defences that may be raised as well as cross-claims relating to the same matter, where appropriate. The court is ultimately concerned with identifying the substance of the controversy between the parties and it is clear from the authorities cited above that this cannot be treated as synonymous or limited to the claimant's pleaded cause of action.

73 There is no legitimate reason why the "matter" jurisprudence in this regard ought to be confined to stay applications under the IAA. The approach

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laid down by this court in *Tomolugen* has been applied outside of the IAA context, for instance, to a stay of proceedings where the arbitration agreement was governed by the Arbitration Act (Cap 10, 2002 Rev Ed): see *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 at [22]–[24]. In our judgment, the "matter" jurisprudence applies equally in the context of an application for an anti-suit injunction where this is predicated on a breach of an arbitration agreement. The underlying question is the same, *ie*, what are the "matter(s)" in dispute between the parties and whether those matter(s) fall within the scope of the arbitration agreement. Considerations of comity may certainly deserve independent attention where appropriate, for instance, where there has been delay allowing the foreign proceedings to become advanced (as recognised in *Sun Travels (SGCA)* at [81]–[84]), but in the present context, we do not think that considerations of comity or the express availability of a *pro tanto* stay under s 6(2) of the IAA should justify a different treatment of the "matter" jurisprudence. Regardless of whether the claimant is applying for an anti-suit injunction or a stay under s 6 of the IAA, the inquiry of ascertaining whether the parties' dispute falls within the scope of the arbitration clause has the same objective – so that the court may act, in both instances, to uphold the contractual bargain of the parties: see the observations of Millett LJ in *The Angelic Grace (CA)* at 96. We are fortified in this view by the fact that, where appropriate, parallels have at times been drawn between a stay and the grant of an anti-suit injunction predicated on a breach of an arbitration agreement. For instance, in the context of determining whether there was a valid and arbitration agreement between the parties, the *prima facie* standard applies in both situations: *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [32]. This demonstrates the undoubtedly close relationship between a stay and an anti-suit injunction where both are predicated on the breach of a valid arbitration agreement between the parties.

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The relevance and application of the various tests

74 As set out above, the Judge adopted the approach formulated in *The Pola Devora* at [37] (with the emphasised parts of the extract below referred to as the "Causative Connection Test" in the GD at [61]):

> Taking a broad and common sense approach to construing the clause, as I am enjoined in *Fiona Trust* to do, a tort claim may be said to arise "in connection with" the charter not only where there are parallel claims in tort and contract (as for example, for breach of a duty of care) but also *where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom.*

75 The Judge was also referred to the case of *Sea Master Special Maritime Enterprise v Arab Bank (Switzerland) Ltd* [2022] EWHC 1953 (Comm) ("*The Sea Master*") for the proposition that there were at least two other approaches to the question of determining if a non-contractual claim fell within the scope of an arbitration clause. The first was the "Parallel Claims Test", alluded to in the passage in *The Pola Devora* at [37] cited above, and it posited that a tort claim may said to arise "in connection with" the charter where there were parallel claims in tort and contract (for instance, for breach of a duty of care). The Judge rightly considered that the Parallel Claims Test was inapplicable to the present facts because the test contemplated a situation where an event (or series of events) gave rise to concurrent liability in contract and tort: GD at [66]. On the facts, there was no suggestion that the Incident gave rise to concurrent liability in tort and contract on the part of the appellant, such that the first respondent had a parallel claim in contract.

76 The second approach cited by the appellant and which bore emphasis was the "Closely Knitted Test", referring to the following passage by the English Court of Appeal in *The Angelic Grace (CA)* at 89:

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> The question in a nutshell is whether the relevant claims and cross-claims arise out of the contract. It is common ground that the question must be answered in the light of *The Playa Larga*, [1983] 2 Lloyd's Rep. 171, in which this Court upheld the dictum of Mr. Justice Mustill that a tortious claim does "arise out of" a contract containing an arbitration clause if there is a sufficiently close connection between the tortious claim and a claim under the contract. In order that there should be a sufficiently close connection, as the Judge said, the claimant must show either that *the resolution of the contractual issue is necessary* for a decision on the tortious claim, *or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one* can properly be construed as covering the other.
>
> [emphasis added]

The inquiry therefore concerned the *question of inseparability* between the facts that found the contractual and non-contractual causes of action respectively. This was a question of fact to be determined in the light of all the circumstances of the case.

77 The Judge considered that the Closely Knitted Test was similar to the Parallel Claims Test in so far as they both considered the extent to which the non-contractual claim may be "recast" as a contractual claim: GD at [67]. The Judge also considered that the Closely Knitted Test was stricter than the Causative Connection Test in so far as it "require[d] a near-total overlap of the facts said to ground the contractual and non-contractual claims": GD at [70]. On this basis, he considered that the Closely Knitted Test was *inapplicable* to the present facts because "[the first respondent's] tort claim *could not* be recast as a claim for breach of the contract of carriage evidenced by the B/Ls": GD at [72].

78 In our view, the Judge erred in construing the Closely Knitted Test as applying only where the non-contractual claim may be *recast* as a contractual

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claim. As illustrated on the facts in *The Angelic Grace (CA)*, the Closely Knitted Test also applied where there was a non-contractual claim and contractual cross-claims under the charterparty. In that case, the charterers' claim in tort was pleaded to have arisen on account of the negligent conduct of the master of the vessel in manoeuvring his vessel during the discharge operations. The English Court of Appeal held that the tortious claim could not be segregated from the contractual cross-claims (*inter alia*, for breach of the safe anchorage warranty in the voyage charterparty), since the same facts that founded the owners' claim in tort, *ie*, the collision that occurred in the course of discharge operations, founded the claims and cross-claims in contract: *The Angelic Grace (CA)* at 91. There was no suggestion that the non-contractual claim was parallel to or could be "recast" as a contractual claim.

79 We emphasised that there can be no universal test that applied to all such disputes since the ascertainment of the relevant "connection" would invariably be a highly fact-specific inquiry that required the court to consider all relevant circumstances. The appellant likewise accepted that the existing "tests" articulated in the cases ought not to be regarded as exhaustive, given the myriad of facts that may be presented. For instance, we were of the view that in a case where a tort claim was a mirror of or parallel to a contractual claim or where the tort claim could be recast as a contractual claim, it would be obvious that such a tort claim would in essence be a contractual claim and would fall within the arbitration agreement. However, as set out above, the mere fact that the tort claim is not parallel to or could not be recast as a contractual claim does *not* necessarily mean that such a claim could not be said to have arisen out of or in connection with the contract. For this reason, the specific application of the Closely Knitted Test to the facts in *The Playa Larga* [1983] 2 Lloyd's Rep 171 ("*The Playa Larga*") at 182–183 referred to by the Judge at [64(b)] and [67]–

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[69] of the GD did not offer any assistance to the present analysis because it was obvious that on the facts of that case, the claim in conversion was not just factually bound up with the contractual claim but was essentially the *same* claim for failing to deliver the contracted quantity under the contract. In that case, the relevant arbitration agreement provided that "[a]ny controversy that might arise from this contract" was subject to arbitration by "The Sugar Association of London". In the court below, Mustill J, having decided the case on the basis that there was a breach of the warranty implied by s 12(2) of the Sale of Goods Act 1893 (c 71) (UK), went on to make the following observations about the identical nature of the contractual and tortious claims (*The Playa Larga* at 182):

> The wrongful acts relied upon as a breach of s 12(2) were the same as those which founded the claim in conversion. The dispute is whether these acts entitled [the buyers] to a remedy, and, if so, for how much. *This was a single dispute, even though the argument upon it was put forward in different alternative ways*; and in my judgment the whole of the dispute in all its aspects can properly be regarded as falling within the scope of the agreement to arbitrate.
>
> [emphasis added]

The English Court of Appeal likewise affirmed that "[t]he common sense of the situation was that a trader who had bargained and paid for a quantity of sugar, in the contemplation that he would receive physical possession of it, had had that sugar snatched away by the vendor just as it was about to be delivered to him": *The Playa Larga* at 183.

80 The same could be said of the decision of Picken J in *The Sea Master* referred to by the Judge at [71] of the GD. The case concerned a cargo of soya bean meal which was shipped from Argentina and originally destined for discharge in Morocco, but delay arose as a result of various complications with the onward sale of the cargo and the vessel was redirected to different ports of

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discharge on a number of occasions. With regard to the substance of the dispute that arose, it was evident that the shipowners' reasonable remuneration/*quantum meruit* counterclaim and contractual counterclaims were, as Picken J noted (at [114]), parallel claims for the entire period of claim. In reaching the conclusion that the reasonable remuneration/*quantum meruit* counterclaims were "effectively the same" as those contractual counterclaims which failed in the arbitration, Picken J explained (*The Sea Master* at [113]):

> The reasonable remuneration/quantum meruit counterclaims are effectively the same as those which failed in the arbitration for damages and/or breach of an implied term. First, they arise out of the same relationship between the parties: Sea Master, as owners of the Vessel and carrier of the cargo, and Arab Bank as the holder of the Switch Bill, having an interest in the cargo. Secondly, the facts giving rise to the counterclaims are the same: the fact that the soya bean meal cargo was not discharged, but instead remained on the Vessel, so that she could not engage in any other business. Thirdly, the period of time covered is materially the same, extending from the discharge of the other cargoes to the final discharge of the soya bean meal cargo. Fourthly, Sea Master counterclaims at the contractual demurrage rate.

81 The Judge discussed *The Pola Devora* in his grounds of decision: GD at [56]–[63]. In that case, the counterclaim for wrongful arrest of a vessel believed to have been beneficially owned by the charterer was found to be causatively connected with the relationship created by the charterparty even though the alleged wrongful arrest occurred *after* the termination of the charterparty. With respect, we would not have found that such a claim (*inter alia*, for inducing a breach of the charter of the "Pola Devora" which was unconnected to the charter between the parties) would fall within the exclusive jurisdiction clause (as it was in that case) because it could not be said that the arrest of a charterer's chartered vessel *after* termination of a separate charterparty of a different vessel was a likely event or consequence in the *performance* of the charterparty of that

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different vessel. Besides, as the arrest occurred *after* termination, the wrongful arrest claim could not be said to have occurred in the performance of the charterparty. While *The Pola Devora* was technically a case dealing with the interpretation of the scope of an exclusive jurisdiction clause in favour of the English courts and not an arbitration clause, it was observed in *Fiona Trust* (at [12]) that there can "hardly be any difference between the two clauses as a matter of construction".

82 Nonetheless, we observe that *even if* the wrongful arrest claim in *The Pola Devora* could be said to be causatively connected with the relationship created by the charterparty, as the Judge considered, we would have thought that this would be *a fortiori* in the present case because the allision occurred in the course of performance of the contracts of carriage as evidenced by or contained in the BLs between the parties. We elaborate on this further below.

83 Similarly, we make the point that *The Angelic Grace*, which decision the Judge also considered, ought to have lent itself to the conclusion that the dispute between the parties in the present case fell within the scope of the Arbitration Agreement. In *The Angelic Grace*, a collision occurred during the course of cargo discharge operations between the chartered vessel and an unpowered lightening vessel owned by the charterer. The charterer brought a claim in tort against the owner in Venice, Italy whereas the owner commenced arbitration proceedings in London against the charterer for claims including a breach of a safe anchorage warranty. The owners applied to the English courts for an anti-suit injunction against the charterer and the English Court of Appeal held (upholding the decision of Rix J at first instance) that all claims and cross-claims arose out of the same incident and, more significantly, that the claim in tort

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could not be segregated from the cross-claims under the charterparty: *The Angelic Grace (CA)* at 91.

84 In our view, *The Angelic Grace* was indistinguishable from the present case. The Judge below sought to distinguish *The Angelic Grace* on the basis that "there were special terms in the voyage charterparty to indicate that the parties contemplated the possibility of collision claims and wished to allocate that risk by contract": GD at [85]. It appears that apart from the lightening clause which permitted the use of certain "Chiogga roads" for cargo lightening operations, the special terms referred to by Rix J (at first instance) were cl 19 as well as the Both to Blame Collision clause in the charterparty. Clause 19, which was an exception clause, referred to "… collisions … and other accidents of navigation … always excepted even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners or other servants of the owners": *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1994] 1 Lloyd's Rep 168 at 171–172 and 174. The passage by Rix J was cited on appeal by the English Court of Appeal, but it was not immediately apparent to us that the English Court of Appeal was "plainly" influenced by the "special terms" in the voyage charterparty in reaching the conclusion that the charterers' tort claim fell within the scope of the arbitration agreement. It would be a stretch to suggest that the mere liberty to allow lightening of cargo meant that the parties "contemplated the possibility of collision claims and wished to allocate that risk by contract" and to thereafter employ that reasoning to suggest that the charterer's tortious claim for damage to the lightening vessel fell within the arbitration agreement. Again, we fail to understand the distinction drawn by the Judge. Adopting the Judge's reasoning, we would have thought that the fact that the cargo loading operation occurred alongside the Jetty with the Trestle Bridge

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would likewise have meant that the parties contemplated the possibility of an allision with the Jetty and/or the Trestle Bridge during cargo operations.

85 In the final analysis, it was important to emphasise that these cited cases were helpful to the extent that they illustrated how the courts approach the "connection" inquiry, *ie*, the arbitration agreement should be construed with common sense and in a manner consistent with rational businessman. This was consistent with the principles expressed in *Fiona Trust*, where Lord Hoffmann stated (at [5]) that the interpretation of an arbitration clause will be affected by its commercial background and that "[b]usinessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language". It has been repeatedly noted that the decision in *Fiona Trust* presented a marked shift towards taking a broad and common-sense approach to construing an arbitration clause. This was a departure from the traditional approach of the English courts, which had previously been based on the precise words used in the arbitration clause: *Rals International* at [30]. In *The Angelic Grace (CA)*, Leggatt LJ likewise expressed (at 91) the need for judicial common sense in the approach to interpretation, and emphasised this point particularly in the context where contractual cross-claims arose out of the same incident. In *Mozambique* (at [107]), in the context of a stay application under the Arbitration Act 1996 (c 23) (UK) ("UK IAA"), Lord Hodge enjoined that s 9 of the UK IAA "is to be applied with common sense" and concluded in that case that rational businesspeople would not seek to send to arbitration such a subordinate factual issue as the "partial defence on quantum" arising in the context of legal proceedings where it was common ground that the legal claims were not within the scope of the arbitration agreements (see [97]–[98] below). In *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936,

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this court held at [30] that "[a]n arbitration agreement … should be construed like any other commercial agreement … The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document". Hence, "as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical": at [33].

86 For completeness, whilst we have thus far surveyed the approaches of the English and Singapore courts, the Australian courts likewise adopt a common-sense approach to the ascertainment of the scope of an arbitration clause. The meaning of the scope of the clause "is to be determined by what a reasonable person in the position of the parties would have understood it to mean, having regard to the text, surrounding circumstances, purpose and object of the transaction": *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] 238 ALR 457; [2006] FCAFC 192 ("*Comandate Marine*") at [162], citing the High Court of Australia in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35 at [22]. In *Comandate Marine*, Allsop J expressed the view at [163] that there was "no relevant difference" between Australian law and English law in this regard by reference to the authorities to which the Full Court of the Federal Court of Australia was referred to. Having extensively reviewed the English and Australian authorities, he emphasised at [175] that "[i]f, subject of course to the context and circumstances of any particular contract, the meaning of the phrase 'arising out of a contract' can be equated with 'arising in connection with' … [t]he width of [the phrases] reflect the practical, rather than theoretical, meaning to be given to the word 'contract' out of which the disputes may arise". He emphasised that "[t]he notion of a contract can involve practical commercial considerations of formation, extent and scope, and performance of the juridical bonds between the parties, out of which disputes may arise" and

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that it would be necessary "in each case to assess the connection of the dispute with the contract – its formation, terms or performance – to see whether disputes fall within the clause, as well … as the terms of the arbitration clause in the context in which they appear". In that case, the court was satisfied that the claims for misleading or deceptive conduct brought under the Trade Practices Act 1974 (Cth) ("TPA (Cth)") concerning pre-contract representations that ultimately culminated in the time charter were within the scope of an "all disputes arising out of" arbitration clause contained in that charter.

The relevance of the merits of the identified or reasonably foreseeable defence(s) or competing claim(s)

87 As alluded to above, the Judge appeared to have expressed certain views on the viability of the Negligent Navigation Defence as contractually provided for under the Head COA: GD at [123]. On appeal, the appellant contended, *inter alia*, that this inquiry erroneously went into the merits of the case which fell squarely within the province of the arbitrator.

88 In our judgment, the merits of an identified or reasonably foreseeable defence and/or cross-claim were generally *irrelevant* to the inquiry, as the genuineness or merits of the dispute was a matter which should properly be left to the arbitral tribunal to assess. This aligned the law governing anti-suit injunctions with the position in applications for a stay of proceedings based on an exclusive jurisdiction clause ("EJC application") and under s 6 of the IAA, where the same normative considerations, including party autonomy, were at play.

89 In *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar Overseas*"), the claimant brought

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proceedings in Singapore in breach of an exclusive jurisdiction clause. On the question of the relevance of the merits of the defence that an applicant may raise in an EJC application, this court held, departing from the rule in *The "Jian He"* [1999] 3 SLR(R) 432 ("*The Jian He*"), that the merits of the defence are irrelevant to the question of whether to grant a stay in an EJC application: *Vinmar Overseas* at [113].

90 In *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*"), in the context of a stay application under s 6 of the then International Arbitration Act (Cap 143A, 2002 Rev Ed), the appellant submitted that in deciding whether there was a "dispute" to be referred to arbitration, the court should assess whether there was a *bona fide* dispute – in other words, whether there was a genuine defence. This court rejected the argument and held, in relation to the question of whether there was a "dispute", that the court "will not assess the merits of a denial/defence or the genuineness of a 'dispute' since these matters should properly be left to the arbitrator to assess": *Tjong Very Sumito* at [40], [46] and [69(e)].

91 Outside of the IAA and EJC contexts, in *The "Rainbow Joy"* [2005] 3 SLR(R) 719, the defendant applied for a stay of the action in Singapore in favour of the Philippines on the basis of the *forum non conveniens* doctrine. The plaintiff argued that a stay should be refused because the defendant had no genuine defence, relying on *The Jian He*. This court rejected the argument and held that in weighing the balance of convenience under the doctrine of *forum non conveniens*, it was irrelevant whether the applicant had a genuine defence as the court should not be required to go into the merits: *The Rainbow Joy* at [27]. Subsequently, in *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 ("*Q & M Enterprises*"), the High Court cited *The Rainbow Joy* and also

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took the view that the merits of the defence were irrelevant in a *forum non conveniens* application: *Q & M Enterprises* at [48]. Andrew Phang JC (as he then was) further observed that the issue as to whether or not proceedings in an action should be stayed concerned the issue of jurisdiction, which was logically prior to the substantive merits of the dispute: *Q & M Enterprises* at [38].

92 Although the juridical basis of a stay based on *forum non conveniens* is different from that of a stay based on the breach of an exclusive jurisdiction clause or arbitration agreement, the common thread underlying these applications is that they all concerned jurisdictional questions rather than the substantive merits of the case: see Joel Lee Tye Beng, "Conflict of Laws" (2005) 6 SAL Ann Rev 144 at paras 8.30 and 8.38. Regardless of whether it is a stay application or an anti-suit injunction application that is predicated on the breach of an arbitration agreement, the court should not be asked to consider questions of merits (including of the merits of an identified or reasonably foreseeable defence or competing claim) at this stage. This would be consistent with our view that a unified approach should be adopted for both applications.

93 Therefore, the merits of an identified defence should generally be irrelevant to the inquiry. Nonetheless, this ought in our view to be subject to the appropriate control mechanisms, such as where it can be shown that the party seeking an anti-suit injunction has acted abusively – in other words, in abuse of process – in raising defence(s) and/or competing claim(s) that are entirely hopeless or doomed to fail. In similar vein, in the context of EJC applications, this court held in *Vinmar Overseas* at [130] that a stay may nonetheless be refused where the applicant has demonstrated abusive conduct. We stress that the threshold for abusive conduct is necessarily high.

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The application to the present facts

94 In the present case, in identifying the "matter" in the Indonesian Proceedings, regard must be had to the defences raised or likely to be raised in order to identify the substance of the controversy. In this case, the defence of "errors of navigation" (*ie*, the Negligent Navigation Defence) was contractually provided for under the Head COA as incorporated into the BLs and the Judge accepted that the defence should be considered for the purposes of the analysis. The defence flowed from cl 63 of the Head COA which the Judge recognised (GD at [122]):

> Clause 63 performs the dual function of:
>
> (a) Expressly excluding liability for "errors of navigation"; and
>
> (b) Doubling as a clause paramount that incorporates the Hague-Visby Rules (as supplemented by the 1979 Special Drawing Rights Protocol), Art IV r 2(a) of which excuses the carrier/ship from liability for loss or damage arising or resulting from any "[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".

95 In our judgment, with respect, the Judge fell into error when he imposed two distinct lines of inquiry in his analysis under the sub-header, "*[t]he relevance of contractual defences to the tort claim*". First, how far the alleged existence of a contractual defence could be taken to suggest that the tortious claim was a "matter" objectively intended by the parties to come within the scope of the arbitration. Second, whether the defence was itself a "matter" falling within the scope of the arbitration agreement: GD at [76]. With respect, we disagreed with the need for both lines of inquiry as it over-complicated the inquiry. It was unnecessary for the court to undertake a separate inquiry to determine whether the parties objectively intended the tortious claim and then

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the defence to fall within the arbitration agreement, having accepted that in considering whether a "matter" was within the scope of an arbitration agreement, the court should take into account the foreseeable defences.

96 Furthermore, the approach under the "matter" jurisprudence instructs the court to consider both the claim and the defence or foreseeable defence together in order to ascertain the substance of the controversy (see [71]–[72] above). In our view, the Judge's approach in relation to "*[t]he relevance of contractual defences to the tort claim*" erroneously treated the claim and defence as discrete matters rather than as a composite inquiry to determine the connection between the two.

97 It also appeared that the Judge's two lines of inquiry at [76] of the GD was inspired by the Judge's understanding of the decision of the UK Supreme Court in *Mozambique*. In particular, the Judge considered that the court's treatment of the defendants' partial defence on quantum in *Mozambique* bore out the second line of inquiry, *ie*, whether the defence itself was a matter that fell within the scope of the arbitration agreement: GD at [86]–[93]. The Judge noted that in *Mozambique*, the Republic of Mozambique (the "Republic") brought claims in the English High Court alleging that it was the victim of a conspiracy involving the defendants, whom it accused of paying substantial bribes to corrupt Mozambican officials. The conspiracy was alleged to have exposed the Republic to a potential liability of at least US$2 billion: *Mozambique* at [4]. The Judge focused on the partial defence on quantum raised by the group of defendants collectively referred to as "Privinvest", whereby Privinvest disputed the Republic's quantification of its claims and asserted that "it [had] provided valuable goods and services and that the Republic [had] squandered them and sabotaged the project for reasons of internal politics":

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Mozambique at [96]. This defence, Privinvest argued, was a matter so closely connected to the three supply contracts taken out to finance the Republic's purchase of equipment and services in connection with its development of its Exclusive Economic Zone that it fell within the scope of the arbitration agreements contained therein, such that the English proceedings should be stayed fully (or, in the alternative, to the extent they related to the defence): *Mozambique* at [101]. As the Judge noted, this argument was rejected by Lord Hodge. The Republic's principal claims were found not to fall within the scope of the arbitration agreement, and Lord Hodge noted that it was against those claims that Privinvest was raising its partial defence on quantum: *Mozambique* at [106].

98 However, it would be critical to appreciate that in *Mozambique*, the court determined that the substance of the controversy between the Republic and Privinvest laid in "whether the transactions, including both the supply contracts and the guarantees, were obtained through bribery and whether the defendants had knowledge at the relevant time of the alleged illegality of the guarantees and Mr Chang's lack of authority to execute them": *Mozambique* at [93]. The defence in question pertained to Privinvest's partial defence on quantum, which was found to have no impact on the central question of liability: *Mozambique* at [87], [89] and [93]. It was in this context that Lord Hodge concluded, having regard to the subsidiary nature of that defence, that Privinvest's dispute on quantum was not sufficiently connected to the supply contracts to warrant a stay of any kind: *Mozambique* at [107].

99 In our view, this stood in marked contrast to the present case, where it was evident that the tortious claim, the contractual defence of negligent navigation and the cross-claim for breach of the Safe Port Warranty all shared

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a common connection – namely, what was the cause of the allision? The answer to that common question had a direct impact on the competing claims and defence. For that reason, we did not think that the precise approach in *Mozambique* which treated the "partial defence on quantum" as distinct from the issues of liability could be transposed to the present case.

100 The Judge held that the first respondent's tortious claim was not causatively connected to any *legal relationship* constituted under the BLs. In our view, the "causative connection" inquiry required an examination of the nature of the tortious claim in tandem with the contractual defence and not the *contracting capacities* of the parties. The fact that the first respondent's claim was brought in its capacity as a jetty owner and not as a shipper did not change the fact that the allision occurred in the performance of the contract of carriage which also provided for the contractual defence of "errors of navigation". In *The Pola Devora*, the counterclaims were brought by the charterer not in its capacity as the charterer but in its capacity as the owner of an unrelated vessel which was allegedly wrongly arrested. While we might have decided *The Pola Devora* differently on the facts, it was clear that for a claim or defence to be causatively connected, there was no requirement that they must be causatively connected to the *legal relationship* under the contract in question. Similarly, in *The Angelic Grace*, the charterers' claim in negligence in the Venetian proceedings was brought in their capacity as the owner of the lightening vessel and did not arise out of the legal relationship under the charterparty. The Judge took the view that the voyage charterparty in *The Angelic Grace* specifically provided for claims resulting from collisions arising in the course of lightening operations: GD at [102]. However, for the same reasons expressed at [84] above, we could not agree with the Judge's view that the voyage charterparty in that case thereby constituted a legally significant relationship between the claimant as owner of

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the "Angelic Grace" and the defendant as owner of the lightening vessel in question. Furthermore, in the decision of the Full Court of the Federal Court of Australia in *Comandate Marine*, in reaching the conclusion that the charterer's claims for misleading or deceptive conduct brought under the TPA (Cth) were within the scope of the "all disputes arising out of" arbitration clause contained in the time charter, there was no suggestion that the TPA claims had been brought by the defendant in its capacity as the charterer. Instead, the defendant claimed that in the course of the negotiations which culminated in the time charter, the plaintiff-owner's shipbroker had made six misleading representations on behalf of the plaintiff to the defendant's broker in contravention of the TPA (Cth).

101 The authorities therefore illustrate that it would be unnecessary to examine whether the claims or defences were connected to the *legal relationship* constituted under the contract.

102 It was clear to us that the parties must have similarly contemplated that a pure tort claim for damage to the Trestle Bridge, caused during the performance of the contracts of carriage between the parties and where the foreseeable lines of defence included recourse to the provisions of those contracts, should be subject to the Arbitration Agreement. First, loading at the Jetty with the Trestle Bridge was not just contemplated, it was contractually provided for. This was the agreed "*1 SP 1 SB*" (1 safe port, 1 safe berth) of "*Oki Sea Port, Palembang, Indonesia*" named in Box 6 of the Head COA and incorporated in the BLs. In this regard, the Judge observed at [79] of the GD that the surrounding terms of the contract may inferentially clarify if the parties intended a particular type of claim should be resolved by arbitration. While we agreed with this proposition, we disagreed with his application. The Judge

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provided a hypothetical example of a term which clearly excluded liability for damage caused to the Trestle Bridge to illustrate that in that situation, the parties must have contemplated the possibility of such incidents occurring and to have contractually allocated that risk in a particular way. On that basis, he opined that a pure tortious claim brought under those circumstances would be subject to the arbitration clause. This analysis was similar to the manner in which the Judge distinguished *The Angelic Grace* which we have already expressed our disagreement with. In our view, the parties through Box 6 of the Head COA had in fact contemplated the possibility of claims arising from loading operations at the Jetty.

103 Second, the allocation of risk for loss caused by negligent navigation was also contractually provided for in the contractual defence of "errors of navigation". With respect, we disagreed with the approach of the Judge that implicitly treated the counterclaim and the defence as "discrete" rather than "connected" matters (see [95] above). As alluded to above, the common "connection" between the first respondent's tortious claim in Indonesia, the appellant's contractual defence of "errors of navigation" under the BLs and the appellant's counterclaim for breach of the Safe Port Warranty ultimately related to the *cause* of the allision. The way the parties pleaded their cases in the various fora, the tortious claim, the cross-claim and the contractual defence *arose out of the very same facts* leading to the Incident. Consequently, it was clear that the parties' dispute arose out of or were in connection with the underlying contracts of carriage in line with the "causative connection" or "closely knitted" tests. It was also in this context that it was relevant that the Incident had occurred at the load port shortly after the Vessel had cast off from the Jetty and was departing from the Terminal. As we indicated during the hearing, the present case where the Vessel allided with the Trestle Bridge as she was being piloted out of the

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port could be contrasted with a hypothetical situation where a vessel, whilst carrying the charterer's cargo and in the course of her voyage to the discharge port, collided on the high seas with another ship that coincidentally happened to be owned by the charterers. The latter dispute was less likely to found a sufficient connection with the performance of the underlying contract of carriage as it would be a fortuitous event in the course of it.

104 We earlier held that the merits of an identified or reasonably foreseeable defence and/or cross-claim were generally *irrelevant* to the inquiry (see [88] above). In the present case, it sufficed for the appellant to identify that the defence of "errors of navigation" was contractually provided for and there appeared to be authorities which supported the assertion of such a defence. In this regard, the appellant relied on the decision of the English Court of Appeal in *The Satya Kailash* at 597 for the proposition that the negligence exception under s 4(2) of the United States Carriage of Goods by Sea Act 1936 incorporated in the charter (which was *in pari materia* with Art IV rule 2 of the Hague-Visby Rules) extended to collision damage to the wharf. It was unnecessary to then examine whether such a defence satisfied the *prima facie* standard. In all fairness to the Judge, whilst he did make some observations that the defence of negligent navigation under the Hague-Visby Rules is typically raised in the context of a relationship between the shipowner and the cargo interest, he did *not* ultimately express a concluded view: GD at [123]. We also clarify that our statements should not be taken to express any concluded view on whether the defence under cl 63 can justifiably be invoked to resist the claim for damage to the Trestle Bridge.

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Should the court concern itself with the prospects of enforcement of the anti-suit injunction?

105 The question of the prospects of enforceability was raised by the Court in the course of the hearing because it appeared to us that there might be some difficulty in enforcing the anti-suit injunction given that the first respondent was based in Indonesia with no known presence in Singapore.

106 In *Evergreen International SA v Volkswagen Group Singapore Pte Ltd and others* [2004] 2 SLR(R) 457 ("*Evergreen International*"), the defendants argued that apart from considering whether service had been properly effected, the court in exercising its discretion to grant an anti-suit injunction on the ground that the foreign proceedings were vexatious or oppressive should also consider whether the injunction would be an effective remedy against the defendants: at [21]. It was contended that the court should consider whether the injunction could be enforceable against the defendants, referring to cases such as *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 and *Locabail International Finance Ltd v Agroexport* [1986] 1 Lloyd's Rep 317 where an injunction was not granted as the defendant had no assets within the jurisdiction.

107 Belinda Ang J (as she then was) held that it was not part of the amenability test that consideration be given as to whether or not the injunction could be enforced: *Evergreen International* at [22]. She cited with approval the statement of this court in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [17] that "[b]eing amenable to the jurisdiction of the local courts simply means being liable or accountable to this jurisdiction". In so doing, Ang J preferred (*Evergreen International* at [24]) the position in *In re Liddell's Settlement Trusts* [1936] 1 Ch 365 ("*Re Liddell's Settlement Trusts*") at 373–374 and *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 574, as

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well as the observation of Lord Bingham in *South Bucks District Council v Porter and another* [2003] UKHL 26 that, otherwise, there would be "one law for the law-abiding and another for the lawless and truculent." Lord Bingham said at [32]:

> When granting an injunction the court does not contemplate that it will be disobeyed … Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate … The rule of law is not well served if orders are made and disobeyed with impunity.

108 In *Re Liddell's Settlement Trusts*, in rejecting an argument that the court should not have made an order against a mother requiring the return of her children because it would have been unenforceable against the mother who remained outside the jurisdiction, Romer LJ likewise observed (at 374) that "[i]t is not the habit of this Court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed".

109 The principle in *Re Liddell's Settlement Trusts* at 374 was recently applied by this court in *Gonzalo Gil White v Oro Negro Drilling Pte Ltd and others* [2024] 1 SLR 307 ("*Oro Negro*") at [111]. That case concerned the grant of permanent prohibitory injunctions that had a similar *effect* to an anti-suit injunction, although, importantly, they were *not* in the nature of an anti-suit injunction. The prohibitory injunctions were granted to restrain a former shareholder of the first respondent (*ie*, Integradora) and a former director of the respondents (*ie*, the appellant) from commencing and/or maintaining any *concurso* or any other insolvency proceedings in Mexico or elsewhere purportedly on behalf of the respondents. The injunctions sought could not be classified as either an anti-suit or anti-enforcement injunction, as they were specifically targeted at Integradora and the appellant: *Oro Negro* at [68]. While it was true that the injunctions also had the practical effect of putting an end to

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the proceedings in Mexico, that was entirely the consequence of the appellant possessing no cause of action in his own name against the respondent.

110 This court applied the principle in *Re Liddell's Settlement Trust* at 374 and held that the relief sought was ultimately granted to restrain breaches of Singapore law, a role which was squarely within the remit and constitutional duty of the Singapore courts. The court further held that "[w]hether a foreign court may choose to give or not to give effect to Singapore's orders was strictly irrelevant and should not operate to bar the granting of the relief": *Oro Negro* at [111].

111 The decisions in *Evergreen International* and *Oro Negro* thus provide strong support for the view that questions of futility are generally irrelevant in the exercise of the Court's discretion to grant an anti-suit injunction. The reason for this was explained by Ang J in *Evergreen International* (see [107] above).

112 We add that this is quite different from the general principle of law that the court should not put itself in the position of making an order which it cannot enforce. It is well established, for instance, in the law of confidentiality that the court will not maintain an injunction where information has already entered the public domain and ceases to be confidential: *Attorney-General v Observer Ltd and others* [1990] 1 AC 109 and this court's decisions in *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 and *Karan Chandur Tilani v Maarten Hein Bernard Koedijk and another* [2024] SGCA 46; see also *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [63]–[65] where this principle was affirmed and applied in the context of pre-action interrogatories.

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113 In any event, we were satisfied in the present case that, as of the date of the grant of the anti-suit injunction, Clasis was still on record as counsel for the first respondent in the SIAC Arbitration. This was confirmed by counsel for the appellant in its letter dated 6 September 2024. Questions of the prospects of enforceability of the court's order thus did not strictly arise.

Conclusion

114 For the foregoing reasons, we held that the Indonesian Proceedings were commenced in breach of the Arbitration Agreement. The Court granted the anti-suit injunction in the terms of Prayer 1 of SUM 2676 and reserved the costs of the application up to and including the costs of the appeal to the arbitral tribunal to be constituted in the SIAC Arbitration.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

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Toh Kian Sing SC, Dedi Affandi bin Ahmad, Hazel Cheah Kam Ying, and Wu Muyu (Rajah & Tann Singapore LLP) for the appellant;
Tan Wee Kong and Poh Ying Ying Joanna (JLex LLC) for the second respondent;
the first and third respondents absent and unrepresented.

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