Neutral Citation Number: [2024] EWHC 896 (Comm)

Case No: CL-2024-000069

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 26/04/24

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

EURONAV SHIPPING NV **Claimant**

- and –

BLACK SWAN PETROLEUM DMCC **Defendant**

- -

Robert Thomas KC and Paul Toms KC (instructed by **Preston Turnbull LLP**) for the **Claimant**
Oliver Caplin KC (instructed by **Campbell Johnston Clark Ltd**) for the **Defendant**

Hearing date: 7 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the *inter partes* hearing of an application by the Claimant ("Euronav") for an anti-anti-arbitration injunction made in support of existing English arbitral proceedings. Euronav's case is that the claims by it against the Defendant ("BSP") and by BSP against it are all subject to a London Maritime Arbitrators Association ("LMAA") arbitration by operation of an arbitration agreement that applies to the parties' relationship by reason of a sub-bailment on terms concerning the consignment of oil which is the foundation of the claims between the parties.

2. BSP opposes Euronav's application on the grounds that it wishes its claims to be resolved by the High Court of Malaysia, there is no relevant arbitration agreement that applies between the parties, BSP's conduct is neither vexatious or oppressive so as to entitle Euronav to the injunction sought even though there is no relevant arbitration agreement between Euronav and BSP and in any event the injunction sought should not be granted as a matter of discretion because of its impact on the comity of this court with the High Court of Malaysia and/or because Euronav has voluntarily submitted to the jurisdiction of the High Court of Malaysia and/or Euronav's delay in commencing these proceedings.

The Facts

3. The relevant background is not seriously in dispute for present purposes. Euronav is a company incorporated in Belgium whose business is the ocean transportation and storage of crude oil and oil based fuels. It is said to be the largest tanker operator in the world and is listed on the New York Stock Exchange as well as in Belgium. It was at all material times the owner of the Motor Tanker Oceania ("Vessel"), which was at all material times anchored at Sunga Linggi, Malaysia, where it was used to store crude oil and oil based fuels.

4. The only relevant contract for present purposes to which Euronav is a party is a storage agreement dated 20 March 2023 ("Agreement"), as amended by Addendum No.1 and (allegedly) Addendum No.2, made between Euronav and Silk Straits SDN BHD ("Silk Straits"), a Malaysian registered company. Under the Agreement, Euronav made available to Silk Straits certain tanks on the Vessel for the storage of up to 192,866 Cubic Meters of either fuel or crude oil for a period of three months +/- 15 days at Silk Straits' option in consideration of a storage fee of US$20,000 per day and various additional loading and discharge fees. The main agreement provided for the term of the agreement to start on 20 March 2023. If Addendum No 2 became binding that was varied to 24 March.

5. In so far as is material for present purposes the Agreement provided at clauses 15 and 16 as follows:

> "**15. Indemnity**
>
> The Client will indemnify the Company and keep the Company indemnified from and against all losses, costs, damages,

> expenses, charges and surcharges suffered or incurred by the Company arising directly or indirectly out of or in relation to:
>
> (a) any breach non-observance or non-performance by the Client of any of its obligations under this Agreement; or
>
> (b) any Claim by a third party relating to the Cargo.
>
> **16. Sanctions Clause**
>
> For the purposes of this Clause:
>
> "Sanctioning Authority" means the United Nations, European Union, United
>
> Kingdom, United States of America or any other applicable competent authority or government.
>
> "Sanctioned Party" means any persons, entities, bodies, or vessels designated by a Sanctioning Authority.
>
> "Sanctioned Cargo" means any cargo, in which a Sanctioned Party has an interest or the loading, carriage, or the discharging of which is sanctioned or prohibited by a Sanctioning Authority.
>
> (b) The Company warrants that at the date of this Agreement and throughout its duration they, the registered owners, bareboat charterers, intermediate disponent owners, managers, the Vessel and any substitute are not a Sanctioned Party.
>
> (c) The Client warrants that at the date of this Agreement and throughout its duration they and any affiliates are not a Sanctioned Party. (d) If at any time either party is in breach of subclause (b) or (c) above then the party not in breach may terminate and/or claim damages resulting from the breach.
>
> (e) the Client shall not present as Cargo, Sanctioned Cargo that they know or should have known is a Sanctioned Cargo.
>
> (f) The Client shall indemnify and hold the Company harmless against all claims, costs, losses, and fines or penalties, arising out of the carriage of Sanctioned Cargo."

By clause 17.2, the Agreement could be terminated with immediate effect by Euronav in the event that Silk Straits breached any term of the Agreement and the breach was not capable of remedy. By clause 21 of the Agreement Euronav was permitted to assign or novate the Agreement in certain defined circumstances, but Silk Straits was prohibited from doing so other than with Euronav's prior written consent. By clause 24, the Agreement provided: "… *the rights and liabilities of the parties under this Agreement will be governed by the laws of Belgium. All disputes arising out of or in*

connection with this Agreement shall be finally settled under the CEPANI[1] Rules of Arbitration in accordance with the said Rules…".

6. By Addendum No.1, also dated 20 March 2023, it was recorded that Silk Straits had sought the consent of Euronav to it assigning some or all "*… of its rights and obligations under…"* the Agreement and that Euronav consented in consideration of Silk Straits agreeing to:

> "1. … guarantee during the Term of the Agreement the performance of all rights and obligations under the Agreement and warrants adherence to all terms and conditions of the Agreement by any party that Client would assign part of its rights and obligations to under this Agreement, including but not limited to the Sanctions Clause.
>
> 2. … indemnify the Company for any and all additional costs relating to the Company allowing the Client to assign any part of its rights and obligations under the Agreement and shall indemnify and hold Company harmless for any liability in relation to the assignment."

Addendum No.1 was expressed to be "…*subject to English law and any disputes arising from or in connection to it shall be resolved by reference to the High Court of England & Wales."* By clause 5 it was agreed that where the terms of the Addendum conflicted with the terms of the Agreement, the terms of the Addendum were to apply. The effect of these provisions were therefore to substitute for the proper law and arbitration agreement in the Agreement, the proper law and jurisdiction agreement set out in Addendum No.1, in relation to any disputes arising from any assignment made pursuant to the consent given by Addendum No.1.

7. Euronav also relies on Addendum No.2. This document is not signed and its validity is in dispute between the parties. The document purported to vary commencement to 24 March and to make various alterations to the fee structure. It included a governing law and arbitration agreement in the following terms:

> "This Agreement and the rights and liabilities of the parties under this Agreement will be governed by the laws of England and Wales. All disputes arising out of or in connection with this Agreement shall be referred exclusively to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this clause. The Arbitral Tribunal shall be composed of three arbitrators and the arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms."

By clause 5, it was provided that in the event of a conflict between the terms of the addendum and the Agreement the terms of the addendum would apply. If and to the extent that Addendum No.2 is valid, the effect of the arbitration agreement in

[1] Belgian Centre for Arbitration and Mediation.

combination with the terms of the Agreement was that the arbitration agreement took effect in place of the agreement that disputes would be resolved in accordance with the CEPANI Rules of Arbitration (or the High Court of England and Wales, applying Addendum No.1) with the governing law being English rather than Belgian law. The governing law change was consistent with the choice of governing law contained in and applicable to Addendum No.1.

8. By an agreement in writing between Silk Straits (described as "Company") and BSP (described as "Client") dated 23 March 2023 ("BSP Agreement"), those parties entered into an agreement under which BSP was to be permitted to store fuel or crude oil on the Vessel in the or some of the tanks to which Silk Straits had the use of by operation of the Agreement, in consideration of the payment by it of the fees set out in that BSP Agreement. Materially for present purposes, BSP agreed with Silk Straits that it would not seek to store on the Vessel " … *Cargo that they know or should have known is a Sanctioned Cargo*." The BSP Agreement informed BSP that Silk Straits was the "*head charterer*" of the Vessel but it did not identify who the owner of the Vessel was. However, Silk Straits had provided to BSP a letter from Euronav which stated that it authorised Silk Straits "… *considering the terms and conditions as agreed in the Storage Agreement and Addendum no. 1 dated 20.03.2023, … to assign any part of its rights and obligations under that Storage Agreement*.". It is strongly arguable that it is to be inferred from this that BSP knew or ought to have known that (a) the next entity up the chain from Silk Straits was the Vessel's owners; (b) that entity was Euronav and (c) the relationship between Euronav and Silk Straits was governed by a charterparty or other contract.

9. On 28 March 2023, BSP transferred a cargo of crude oil ("Cargo") from MT Abyss to the Vessel for storage. The BSP Agreement states that BSP either owns or had lawful title to the Cargo. Euronav maintains that as a result of this, and because BSP either knew or ought to have known that Euronav was the owner of the Vessel by reason of the information supplied to it by Silk Straits - referred to above - and that its relationship was governed by a contract between it and Silk Straits, upon the transfer of the Cargo to the Vessel, BSP transferred possession of the Cargo to Euronav and that a relationship of sub-bailment in relation to the Cargo arose between Euronav and BSP on the terms of the applicable agreement between Euronav and Silk Straits. Euronav maintains that the applicable agreement is the Agreement as varied by Addendum Nos 1 and 2 and therefore that BSP is bound by the arbitration agreement contained in Addendum No.2.

10. United Against Nuclear Iran ("UANI") is a non-profit and non-partisan organisation that claims to exist for the purpose of preventing Iran from obtaining nuclear weapons. On 28 March 2023, its CEO wrote to Euronav's CEO alleging that the Cargo was Iranian oil, which MT Abyss had loaded at Bandar Mahshahr on 21 February 2023 at a time when, contrary to applicable international conventions and laws, her crew had disabled her Automatic Identification System ("AIS"). UANI suggested that the transfer of the Cargo to the Vessel from MT Abyss was not "*…consonant…*" with "… *the specific U.S. sanctions already imposed on Iran's energy, ports and shipping sectors*." It ended its letter by asking Euronav "*… to clarify the forgoing"*.

11. Unsurprisingly given the nature of the allegations made and its listing on the New York Stock Exchange, on 1 April 2023, Euronav wrote to Silk Straits concerning these

allegations, referring expressly to the UANI letter, recording that Silk Straits had maintained that the origin of the Cargo was Basrah in Iraq and requiring that by 3 April 2023 Silk Straits " … *provide the necessary documentation/proof, to confirm that the Contested Cargo has been loaded in Basrah, IRAQ, and is not of Iranian origin as claimed by UANI. Such evidence can be (but is not limited to): vessel logs from the MT Abyss, photos from the loading operations conducted in February 2023 in Basrah, Iraq, and a statement from the exporter (SOMO) that this cargo has been loaded in Basrah, Iraq on the dates mentioned on the cargo documents & Bills of lading* …".

12. The relevant documentation was not forthcoming but Euronav's own investigations led it to conclude that the bill of lading provided for the Cargo was probably forged, that there was no credible evidence that MT Abyss docked at any Iraqi port during the relevant period and that the Cargo " … *was of Iranian origin, traceable to the National Iranian Oil Company ("NIOC") and the Islamic Revolutionary Guard Corps Qods Force ("IRGC").*" Both NOIC and IRGC are sanctioned entities, under US sanctions law. In those circumstances, Euronav concluded that the Cargo was a sanctioned cargo and that BSP either knew or ought to have known of the true origin of the Cargo. On 3 July 2023, the US District Court for the District of Columbia issued a seizure warrant for the Cargo. The US Department of Justice ("DoJ") served the Warrant on Euronav shortly thereafter. Given the conclusions it had reached, Euronav considered it had no real alternative but to surrender possession of the cargo to the DoJ. It terminated the Agreement pursuant to clause 17.2(a) by reason of the Cargo being Sanctioned Cargo within the meaning of clause 16.

13. On 14 September 2023, BSP sought and obtained an arrest warrant for the Vessel from the High Court of Malaysia on the basis that Euronav was a sub-bailee of the Cargo and by surrendering possession of it as I have described Euronav had unlawfully converted it.

14. Five days later, on 19 September 2023, Euronav commenced arbitration proceedings in London against BSP alleging that its inability to deliver the Cargo to Silk Straits or BSP was caused by BSP's breach of the terms of the sub-bailment ("London Arbitration").

15. On 16 October 2023, BSP served its Statement of Claim in the Malaysian proceedings claiming damages for failure to deliver the Cargo and on 17 October it informed the tribunal convened to hear the London Arbitration ("Tribunal") that it intended to contest the jurisdiction of the Tribunal on the basis that there was no valid arbitration agreement between the parties.

16. Following an invitation from the Tribunal to the parties to agree directions, on 18 October, BSP proposed that its jurisdiction challenge be determined as a preliminary issue. Euronav objected and following some procedural steps I need not take up time describing but which included an exchange of written submissions on the issue, on 18 December 2023, the Tribunal decided by a majority that BSP's jurisdiction challenge should not be determined as a preliminary issue and on 22 December issued a formal order to that effect.

17. On 26 October 2023, Euronav applied to the High Court of Malaysia for an order staying or striking out the claim in the Malaysian proceedings or for a stay under the Malaysian Arbitration Act on the basis that any dispute concerning the Cargo had to be

resolved in the London Arbitration. That application came before Ong Chee Kwan J on 13 December 2023 and was dismissed. In his reasons for dismissing the application, the Judge concluded that by applying to strike out the Malaysian proceedings, Euronav had taken a step in the proceedings and so was precluded from seeking a stay in favour of arbitration under the Malaysian Arbitration Act. This eliminated any need for him to determine whether there was an arbitration agreement between the parties, which the Judge expressly left to be determined by the Tribunal.

18. On 15 December, Euronav filed a Notice of Appeal against Ong Chee Kwan J's order refusing to stay or strike out the Malaysian proceedings. That appeal is pending. It is unclear when it will be finally determined. There has been no stay of Ong Chee Kwan J's order pending appeal. As things stand therefore, the High Court of Malaysia has decided that Euronav has submitted to the jurisdiction of that court and that is binding on the parties unless and until overturned by the Malaysian Court of Appeal.

19. On 29 December 2023, BSP notified the Tribunal that it had served Euronav with an anti-arbitration injunction application to the High Court of Malaysia. BSP indicated that it contended that Euronav had submitted to the jurisdiction of the High Court of Malaysia by filing a strike out application in that court in relation to BSP's proceedings. It asked for a stay of the London Arbitration. Euronav opposed that as being an attempt to undermine the arbitration. On 11 January 2024, the Tribunal rejected the stay application on the basis that it was inconsistent with the Tribunal's duties. On 25 January 2024, it fixed a final hearing to determine all substantive issues starting on 1 July 2024.

20. On 29 December 2023, BSP had issued its anti-arbitration application to the High Court of Malaysia. Although Euronav criticises this conduct, it is difficult to see what else BSP could have done. The effect of the Tribunal's decision not to determine jurisdiction as a preliminary issue and not to stay the London Arbitration as requested was to force BSP to participate on the merits in an arbitration it maintained that the Tribunal had no jurisdiction to determine at a time when it had been held by the High Court of Malaysia that Euronav had submitted to its jurisdiction in relation to the dispute. Although Euronav suggests there were other solutions available to BSP (see the summary at paragraph 105 of Euronav's skeleton submissions) these were unreal in the circumstances given that the Tribunal had declined to resolve the jurisdiction issue as a preliminary issue and had not resolved that issue, BSP's centre of operations and the binding conclusions of the High Court of Malaysia concerning Euronav's voluntary submission.

21. On 5 February 2024, Euronav issued the application before me which is for an order restraining BSP from pursuing or continuing with its anti-arbitration application in Malaysian Proceedings and from seeking to prevent Euronav from pursuing its claims against BSP otherwise than in the London Arbitration. That application came before me on very short notice to BSP on 6 February 2024, which was disposed of by an undertaking by BSP not to seek any mandatory order in Malaysia (and specifically any order requiring the Claimant to discontinue the London Arbitration commenced by the Claimant on 19th September 2023) other than one that would only take effect two days after the final determination of Euronav's application now before me.

22. On 7 February 2024, the High Court of Malaysia determined BSP's application and ordered that Euronav be restrained from continuing with the London Arbitration until after final disposal of the appeal to the Malaysian Court of Appeal from the order of Ong Chee Kwan J referred to above and from commencing any new arbitration in connection with the dispute concerning the Cargo. Euronav has informed BSP that it will not take any further steps in the London Arbitration until the final determination of the application before me and has indicated it will appeal from the anti-arbitration order made by the Malaysian High Court referred to above. It strikes me as improbable that any such appeal will be determined other than at the same time as or after determination of the appeal concerning the dismissal of Euronav's stay or strike out application. There is no evidence that suggests otherwise. On this application, Euronav seeks an order from the English Court requiring BSP to take steps to set aside the 7 February order ("AAI Order") and, in the meantime, to not enforce it.

23. At one stage there was or appeared to be a technical debate between the parties as to whether the court derived its jurisdiction to determine this application from s.37 of the Senior Courts Act 1981 or s.44 of the Arbitration Act 1996. Since BSP accepts that the relief Euronav seeks can be granted under s. 37 of the Senior Courts Act 1981, and Euronav is content to proceed under that provision, I need say no more about this issue.

24. As is apparent from the chronology set out above, there are three possible outcomes on this application – (a) that it succeeds; (b) that it is dismissed or (c) that it is adjourned or stayed with liberty to restore once the Malaysian Court of Appeal has handed down its judgment on Euronav's stay or strike out appeal.

Discussion and Disposal

25. Euronav contends that the AAI application was made in breach of an arbitration agreement that is binding as between Euronav and BSP in the events that have happened and there are no strong reasons why the order sought by Euronav should not be granted. Alternatively it submits that even if there is no arbitration agreement that is binding between Euronav and BSP, the injunction it seeks should nonetheless be granted because the AAI Order application is vexatious and oppressive. I refer to these routes as respectively the contractual and non-contractual routes below.

The Contractual Route

26. The general principles that apply in this area have been stated and re-stated on numerous occasions. In summary, it is for the applicant (in this case Euronav) to prove to "*a high degree of probability*" that there is an arbitration agreement which governs the dispute in question – see Times Trading Corporation v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm) *per* Cockerill J at paragraph [38(v)] following Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 *per* Sir Terence Etherton MR at [39] and, most recently, LLC Eurochem North-West-2 v. Tecnimont SPA and another [2023] EWCA Civ 688 *per* Nugee LJ at [106] and [113], dissenting in the result but not on these points. If that requirement is satisfied then the Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration agreement unless the defendant can prove strong reasons to refuse the relief sought - see The Angelic Grace [1995] 1 Lloyd's Rep 87, Donohue v Armco Inc

[2002] 1 All ER 749 *per* Lord Bingham at [24]-[25] and LLC Eurochem North-West-2 v. Tecnimont SPA and another (ibid.) *per* Nugee LJ at [113].

27. Mr Thomas KC submitted that the *rationale* for this test is the likelihood that even an interim injunction is likely in practice to be equivalent to a final injunction. He maintains that analysis does not apply in this case because " … *the London Arbitration would continue but without restraining the foreign proceedings*." To my mind this misses the real point. If the Order sought is granted, then BSP will be placed in exactly the same position it was in prior to the grant of the AAI Order – it would be forced to participate on the merits in an arbitration commenced by Euronav that BSP maintains that the Tribunal has no jurisdiction to determine at a time when Euronav has been held by the High Court of Malaysia to have submitted to its jurisdiction in relation to the dispute.

28. Although Mr Thomas submits that I should determine this application by applying the American Cyanamid approach of asking only whether there is a serious issue to be tried as to the contractual position, I regard that as mistaken. The effect of the order sought will be to preclude BSP from litigating in a manner that it chooses a claim it has against a party with whom it has no contractual relations in the state court that it maintains has jurisdiction to determine the claim, and to whose jurisdiction Euronav has been held to have submitted. It will permit both the Malaysian court proceedings and the London Arbitration to continue resulting in an entirely undesirable race to judgment, obvious risk of inconsistent decision making, needlessly complex and expensive enforcement issues and obvious duplication of work in two jurisdictions at enormous avoidable cost. To make such an order using the contractual route without being satisfied to a high degree of probability that an arbitration agreement exists which binds the respondent to such an application would be wrong in principle and contrary to authorities going back many years including authority at Court of Appeal level. It also introduces an unneeded extra layer of complexity into these applications that will generate uncertainty, delay and additional cost. If an applicant cannot prove the existence (or breach) of an applicable arbitration (or exclusive jurisdiction) agreement to a high degree of probability (or cannot show that the proceedings in respect of which a prohibitory injunction is sought are sufficiently vexatious or oppressive to merit the making of an order using the non-contractual route) then the court should not be contemplating making such an order.

29. I accept Mr Caplin KC's submission that the high degree of probability test requires a judge to be satisfied there is a high degree of probability that at a notional trial, the applicant will be able to prove the existence (and breach) of an arbitration agreement on the balance of probability. It follows that if a court has what Mr Caplin characterises as "*... real and cogent doubts...*" based on the material currently available, then that burden will not be discharged.

30. In this case, Euronav's contractual case depends upon it demonstrating that there was a sub-bailment of the Cargo to it by BSP on the terms of the Agreement as amended by Addendum No.2 in circumstances where BSP denies there was a sub-bailment on terms, that Addendum No.2 was ever agreed between Silk Straits and Euronav, and in any event that the AAI application to the High Court of Malaysia constitutes a breach of that agreement (assuming it applies to the relationship between BSP and Euronav). It follows from what I have said that on each of these issues, Euronav must prove its case

to a high degree of probability as that test is to be understood, if it is to prove that the AAI Application itself is a breach of the arbitration agreement on which it relies.

The Arbitration Agreement Issue

31. It is necessary therefore to consider whether Euronav has shown a high degree of probability that at the hearing of the arbitration it will be able to establish that there is a binding arbitration agreement that is or has become binding between it and BSP. It is bound to rely on the Agreement as amended by Addendum No. 2 since (i) Addendum No. 1 is concerned with assignment and therefore neither it nor the governing law and jurisdiction provisions contained in it apply to the facts of this case and (ii) the unamended version of the Agreement does not provide the necessary jurisdiction for the arbitral tribunal, who were appointed under the LMAA Rules, not the CEPANI Rules.

32. Euronav's case on this issue depends on two propositions being (i) that Addendum No. 2 was agreed between Silk Straits and Euronav; and (ii) that BSP bailed the Cargo to Silk Straits who in turn sub-bailed the Cargo to Euronav in circumstances where the relationship between Euronav as sub-bailee and BSP as head bailor was governed by the terms of the Agreement as varied by Addendum No.2. It must establish that it has a high degree of probability of establishing each of these propositions before the Tribunal.

The Addendum No.2 Issue

33. BSP submits that Euronav is unable to show a high degree of probability that it will be proved that Addendum No.2 was ever agreed, essentially because it was not signed or stamped by either party, there is no document or communication to Euronav from Silk Straits by which Silk Straits expressly agreed the terms set out in Addendum No.2, and the circumstantial evidence does not establish or is not unequivocally consistent with Silk Straits having agreed to those terms.

34. The material that demonstrates that Addendum No.2 was agreed is limited. As I have explained earlier in this judgment the Agreement was agreed on 20 March 2023.

35. The negotiations leading to Addendum No.2 commenced with an email of 23 March 2023, Silk Straits asked Euronav for two changes to the Agreement being (a) a change of commencement date from 20 to 23-24 March and (b) a change to the governing law provision so that it provided for the governing law to be that of Singapore and for disputes to be resolved by SIAC arbitration.

36. On 24 March 2023 Euronav forwarded to Silk Straits an unsigned copy of Addendum No. 2. It did not purport to change the governing law to the laws of Singapore, nor did it provide for SIAC arbitration, but on the contrary purported to provide for the governing law of the Agreement to be English law and provided for the resolution of disputes by LMAA arbitration clause. In my view, by sending the unsigned Addendum No.2 to Silk Straits, Euronav made a counter offer in respect of the changes sought by Silk Straits by its 23 March email, which required acceptance if it was to become binding.

37. Silk Straits responded to this the same day with an email stating "*Good day, the addendum well received*". In my view this language is ambiguous. Read in isolation it is more likely to be an acknowledgement that what had been sent on behalf of Euronav had been received rather than an acceptance of its terms. That is all the more likely because the Agreement provided that any addendum to it had to be signed (see clause 1) and that Addendum No. 1 had been completed in this manner on behalf of Silk Straits. In my judgment Euronav has not shown a high degree of probability that the email response from Silk Straits constitutes an express acceptance of the terms set out in the unsigned Addendum No.2 sent to it by Euronav.

38. Between 24 and 28 March there was a significant amount of commercial correspondence passing between Silk Straits and Euronav concerning issues such as the stowage plan with that correspondence proceeding on the clear basis that the Cargo was going to be stored on the Vessel. At no stage was there any correspondence that suggested an agreement had not been reached nor any reservations pending completion of any negotiations. On 28 March Silk Straits delivered the Cargo on to the Vessel. Euronav submits that it did so with knowledge of the terms of Addendum No. 2 and therefore that conduct constituted an acceptance of the terms set out in Addendum No. 2. Finally on 3 April 2023, Euronav emailed Silk Straits with an invoice for storage charges showing hire starting from 23 March not 20 March.

39. This material when assessed objectively and as a whole (and leaving to one side the invoice to which I refer further below) satisfies me that there is a high level of probability that Euronav will prove at the arbitral trial the arbitration agreement between it and Silk Straits on which it relies. Although Mr Caplin says that in none of the documents that postdate 24 March is there any mention of Addendum No.2, that is not the central point. Had there been an on going dispute about the terms of the Addendum that would have been apparent from reservations of rights and references back to negotiations going on elsewhere. There is no such material.

40. It is likely that the two most important commercial changes being sought by Silk Straits were the variation of the start date of the term (because otherwise it would have been exposed to paying from 20 March at the rate of US$20,000 per day until the start date agreed with BSP) and the variation of the rates so as to bring them into line with what was being paid under the BSP agreement with Silk Straits. Governing law and dispute resolution provisions were unlikely to be viewed as of equal importance. That said, it is noteworthy that Addendum No.1 had been made subject to English law without any obvious dispute, which suggests that issue was not one of particular significance for Silk Straits. These factors when taken together establish a high level of probability that at trial, the Tribunal will conclude that it is more likely than not that that Silk Straits was willing to agree to the terms set out in Addendum No.2 and is likely to explain why there is no further mention of negotiating the terms of the Agreement or Addendum No.2.

41. Mr Caplin submitted that the 3 April invoice was positively against Euronav's case because it provides for storage charges to run from 23 March whereas Addendum No. 2 records the term as starting on 24 March. In my judgment that is classically an issue for trial. Mr Caplin's point does not demonstrate that the parties were working on the basis that the agreement between them was the Agreement any more than of itself it shows that the parties were working on the basis that the Agreement as varied by

Addendum No.2 applied. It may be capable of being explained in the way postulated by Mr Caplin or it may be a clerical error. Of itself it helps neither party and will need to be explored at trial with the assistance of witness evidence. It is the remaining material when taken together and considered in its relevant context that establishes the strong probability that the Tribunal will conclude that Addendum No. 2 became binding between the parties by their conduct.

The Bailment On Terms Issue

42. Mr Caplin submits that Euronav has failed to show that it has a high probability of proving at the trial before the Tribunal that the sub-bailment to Euronav was on the terms of its agreement with Silk Straits even if (contrary to its case) there was an arbitration agreement between it and Silk Straits in the term set out in Addendum No.2.

43. So far as bailment is concerned, in this case the sub-bailee is Euronav, the bailee is Silk Straits and the owner and, therefore, head bailor is BSP. The applicable principles are those set out by Lord Goff in The Pioneer Container [1994] 2 AC 324 approving earlier Court of Appeal and Privy Council authority to similar effect. In summary:

    i) where goods had been sub-bailed with the authority of the owner (BSP), the obligation of the sub-bailee (Euronav) towards the owner (BSP) is that of a bailee for reward and the owner (BSP) is able to proceed directly against the sub-bailee (Euronav) under the law of bailment without having to rely on the contract of sub-bailment between the bailee (Silk Straits) and the sub-bailee (Euronav); and

    ii) Where a sub-bailee (Euronav) voluntarily takes goods into its custody, it could only invoke the terms of the sub-bailment (here as between Euronav and Silk Straits under the Agreement as varied by Addendum No.2) as qualifying or otherwise affecting his responsibility to the owner (BSP) if the owner (BSP) had expressly or impliedly consented to those terms or had apparently authorised them.

    By reference to these principles, Euronav argues that it has a high probability of proving at trial before the arbitrators that the bailment as between it and BSP was regulated by the Agreement as varied by Addendum No.2 and thus that the arbitration agreement in Addendum No.2 is enforceable against BSP by Euronav. BSP disputes that Euronav has proved that to be so.

44. Mr Caplin submits, and I accept, that there is no evidence of an express consent or authority given by BSP to Silk Straits to sub-bail the cargo to Euronav on the terms of the Agreement as varied by Addendum No.2. This is different from the facts in The Pioneer Container (ibid.) where express consent was given to sub contract on any terms.

45. That said, as I explained earlier in this judgment Euronav maintains that BSP was informed that Silk Straits was the "*head charterer*" of the Vessel, that Euronav was or was probably the owner of the Vessel, and thus that Silk Straits had concluded a storage agreement with Euronav. It follows, so it is submitted by Euronav, that BSP knew that any cargo stored on the Vessel pursuant to the BSP Agreement would be placed in the possession of and therefore bailed to Euronav pursuant to the Agreement and that as a

result BSP necessarily consented to Euronav holding the Cargo on the terms of the Agreement, whatever those terms may be.

46. Mr Caplin describes this as a "*paper thin point"*. He maintains that the assignment letter is irrelevant because no assignment took place here. I agree. However that is not the point: Euronav relies on the letter for the purpose of demonstrating that BSP knew or ought to have known of Euronav's identity and relationship with Silk Straits when it received the letter. I consider there is a high probability that Euronav will make good that point before the arbitral tribunal.

47. Mr Caplin's real point is that simply knowing that Silk Straits was the head charterer takes no one anywhere. He accepts at least implicitly that if Silk Straits was known to be the head charterer of the Vessel it follows that it is probable that Silk Straits' contract would be with the owner of the Vessel. Mr Caplin submits however that this does not assist because there are different types of charter, some of which (demise charters being an example) involve the owner parting with possession and others (time or voyage charters being examples) which do not. In my judgment none of this leads to the conclusion that Euronav does not have a high probability of proving the sub-bailment to it was on the terms of its agreement with Silk Straits. It is not suggested that BSP made any attempt to investigate or even enquire as to Euronav's status generally or specifically in relation to the nature of its charter arrangements with Silk Straits concerning the Vessel. By acting in that manner BSP took the risk that the terms of the Agreement as varied would be different from the terms of the BSP Agreement. By agreeing to possession of the Cargo being transferred to Euronav without enquiring as to the terms that governed its relationship with Silk Straits, there is a high probability that the arbitral tribunal will conclude that BSP necessarily consented to Euronav holding the Cargo on the terms of the Agreement whatever those may be. It was always open to BSP to decide whether to rely on its contractual rights as against Silk Straits or assert its bailment rights as against Euronav. However, having decided to rely on its bailment rights against Euronav, Euronav has shown it is a strong probability that the Tribunal will conclude that sub-bailment was on the terms of the Agreement.

48. In summary therefore I am satisfied that there is a high probability that Euronav will make good its case both in relation to Addendum No.2 being of contractual effect and that the sub-bailment of the Cargo to Euronav was a sub-bailment on the terms of the Agreement as amended by Addendum No.2, and accordingly that in relation to its claim in bailment against Euronav it is bound by the arbitration agreement contained in Addendum No.2.

The Breach Issue

49. Mr Caplin submitted that (a) Euronav does not seek to restrain BSP's claim in the High Court of Malaysia proceedings generally, but only BSP's AAI application and (b) the AAI application is not a breach of any arbitration agreement that Euronav claims to be binding on BSP.

50. The AAI as granted provides principally that Euronav is " … *restrained from pursuing, continuing and/or proceeding with the London Maritime Arbitrators Association arbitration (the "LMAA Arbitration") against [BSP] pending the final disposal of the appeal to the Court of Appeal*…". The appeal referred to is the appeal from the decision

of the High Court of Malaysia that Euronav has submitted voluntarily to its jurisdiction. The limited nature of the order currently in place leads Mr Caplin to submit that it is merely a case manangement order. However the application notice in the Malaysian proceedings was cast in the conventional language of an AAI application and in the event that the appeal by Euronav fails, it is probable that BSP will renew its application to the High Court of Malaysia for an order restraining Euronav from continuing with the LMAA arbitration and may seek a mandatory order requiring those proceedings to be discontinued. But for the possible effect of the High Court of Malaysia's conclusion that Euronav has submitted to its jurisdiction in relation to the subject matter of the arbitration, I would be bound to reject BSP's submission that its AAI application is not in breach of the arbitration agreement contained in Addendum No.2. That is so because the AAI in its current form prevents compliance by Euronav with the directions given by the arbitrators. If the Malaysian appeal fails the current order is likely to be continued or extended. All these orders are a breach of the terms of the arbitration agreement in Addendum No.2. The question that arises therefore is whether the conclusion of the High Court of Malaysia that Euronav has voluntarily submitted to its jurisdiction in relation to its dispute with BSP (which as I have said is binding on the parties unless and until overturned by the Court of Appeal of Malaysia) makes any difference.

51. The basis of BSP's AAI application to the High Court of Malaysia is that it is vexatious and oppressive for Euronav to continue to pursue the arbitration notwithstanding that it has submitted to the jurisdiction of the High Court of Malaysia. There is nothing unconventional or overreaching about such an order – it is one that this court has jurisdiction to grant and has granted in the past – see Excalibur Ventures v. Texas Keystone [2011] 2 Lloyds Rep 289 *per* Gloster J at [69] to [70] and in particular [70 (iii) and (v)]. It is to be noted however that Gloster J described that case as being "*exceptional"* – see [70].

52. It also follows that the AAI is concerned with protecting or at any rate enforcing the decision of the High Court of Malaysia that Euronav has submitted to its jurisdiction. In my judgment this particular factor engages the comity of this court with that of the High Court of Malaysia in a way that simply does not arise in conventional applications of the sort I am not considering. As things stand, the arbitral tribunal has declined to resolve the jurisdictional issue that arises (which is a question exclusively for the arbitral tribunal to resolve) until it determines the whole dispute, whereas the High Court of Malaysia has determined that Euronav has submitted to its jurisdiction which (since the High Court of Malaysia's order has not been stayed) is a determination that is final and binding on the parties, subject only to Euronav's appeal.

53. BSP submits that in these circumstances, the AAI application is not a breach of any arbitration agreement that would otherwise apply to the dispute. I do not accept that is so, at any rate on the basis alleged – that is that the AAI order is simply "*…a legitimate case management corollary of the wider Malaysian Proceedings, which are to proceed to trial, and Euronav's engagement with them…*". It may well be that as a matter of Malaysian procedural law that is a correct analysis. However, even if it is correct, it does not prevent an application for such an order by BSP being a breach of the arbitration agreement in Addendum No.2. It may be that by voluntarily submitting to the jurisdiction of the High Court of Malaysia, Euronav has repudiated or has waived its right to rely, or has become estopped from relying on the arbitration agreement in Addendum No.2, but that has not been argued on this application. In those

circumstances, I cannot conclude that what would otherwise be a breach of the arbitration agreement has ceased to be so because Euronav has voluntarily submitted to the jurisdiction of the High Court of Malaysia.

54. However the question that remains is whether an injunction sought by Euronav should be granted as a matter of discretion.

Discretion

55. In my judgment as a matter of discretion, I ought to refuse to consider whether to grant the injunction sought until after determination of the appeal by the Court of Appeal of Malaysia. My reasons for reaching that conclusion are as follows.

56. Firstly, as I have explained already, if an injunction were to be granted in the terms sought it would impact on the comity between the English and Malaysian courts in a manner that is inappropriate. This is so because currently the order made by the High Court of Malaysia restrains Euronav from taking any steps in the arbitration until after final determination of the appeal, whereas Euronav seeks to restrain the AAI application in the Malaysian proceedings over which there is otherwise no challenge and thereby seeks to circumvent the conclusion that Euronav has voluntarily submitted to the jurisdiction of the High Court of Malaysia, which it is entitled to protect by prohibiting a party over which it has jurisdiction from continuing duplicative proceedings and which BSP has a legitimate juridical interest in preserving and protecting. It is mistaken for Euronav to submit that it is not seeking to interfere with the processes of the Malaysian High Court. The application it seeks to restrain is one that is necessary to protect or give full effect to the Malaysian High Court's conclusion concerning jurisdiction. The suggestion that the High Court of Malaysia would welcome such interference strikes me as fanciful but in any event is beside the point given that comity in this context is a question for the English court to be determined objectively by reference to the effect of the order being sought from the English court. To be clear, I reject the notion that this case is a straight forward case where "*…there is little mileage in a "ritual incantation"… of the doctrine of comity…"* – see Credit Suisse First Boston (Europe) v MLC (Bermuda) [1999] 1 Lloyds Rep 767 *per* Rix J as he then was. That ceased to be so once Euronav voluntarily submitted to the jurisdiction of the High Court of Malaysia. Although Euronav places very considerable reliance on what it characterises as the "*…importance of enforcing the forum clause…*" that ignores entirely that it has submitted to the jurisdiction of the Malaysian court. It is that which makes this a case apart from the straightforward case to which Rix J was referring.

57. Secondly, if I was to make the order sought, it would result in duplicative proceedings with all the consequences that will or may follow as a result, which I have summarised earlier. It is wrong for Euronav to characterise its application as simply seeking to preserve the Tribunal's right to rule on its own jurisdiction. The effect of such an order will be to facilitate the conduct of duplicative proceedings in which Euronav hopes to obtain a favourable liability award before the Malaysian court has been able to adjudicate on the issues that arise in proceedings in respect of which Euronav has submitted to the jurisdiction of that court. That is to encourage not discourage duplicative proceedings with all the problems and expense that follows. In my judgment therefore, even if I am wrong to think that the interference with comity is greater and more objectionable than in most applications of this nature, it is nonetheless material to

the exercise of discretion that the consequences of granting the order sought will be that duplicative proceedings will continue. That is an outcome that most courts would wish to avoid. That is particularly so here, where it is clear that each party perceives there to be an advantage in delaying the proceedings it objects to.

58. Thirdly, as I have said already, Euronav has been held voluntarily to have submitted to the jurisdiction of the Malaysian courts. That order is binding on the parties unless it is overturned on appeal because it has not been stayed or suspended pending appeal. Having voluntarily submitted to the jurisdiction of the High Court of Malaysia, in my judgment it is vexatious and oppressive for Euronav then to seek orders from the English court that will enable it to continue to pursue the arbitration at the same time and in relation to the same issues. That is all the more the case where Euronav has resisted the resolution of the jurisdiction issue by the arbitral tribunal as a preliminary issue and the stay of the arbitral proceedings until at least the determination of the appeal in Malaysia. I accept that if the Malaysian appeal succeeds, there will have been a change of circumstances that may merit a different outcome. However, as things stand, I am bound to proceed on the basis that the order of the High Court of Malaysia is binding on both parties.

59. Fourthly, given the conclusion of the High Court of Malaysia that Euronav has voluntarily submitted to its jurisdiction in relation to the dispute between the parties, BSP is fully entitled to invoke the jurisdiction of that court to protect the jurisdiction of that court, to give fill effect to the juridical advantages that it has obtained as a result of Euronav's voluntary submission, and to avoid the consequences that follow from the commencement or continuation of duplicative proceedings. It is obviously vexatious for BSP to be required to defend the arbitral proceedings (where it has challenged jurisdiction but not had its jurisdictional challenge determined) whilst at the same time prosecuting the Malaysian proceedings, where the claimant in the arbitral proceedings (Euronav) has voluntarily submitted to the jurisdiction of the Malaysian High Court in relation to those proceedings.

60. Fifthly, As Mr Caplin put it, "… *Euronav has been the architect of its own position in the Malaysian Proceedings*…". Rather than engaging substantively in the proceedings in Malaysia, it could have issued this application on or shortly after 16 October 2023, when BSP served its Statement of Claim in the Malaysian proceedings claiming damages for failure to deliver the Cargo, or 17 October 2023, when BSP informed the Tribunal that it intended to contest the jurisdiction of the Tribunal on the basis that there was no valid arbitration agreement between the parties or, on any view, by 26 October 2023, when Euronav applied to the High Court of Malaysia for an order staying or striking out the claim in the Malaysian proceedings. In fact this Arbitration claim and application was issued only on 5 February 2024, 2 days before BSP's application for the AAI was to be heard by the High Court of Malaysia. This delay is a factor I am entitled to take into account and take into account when considering how best to respond to this application as a matter of discretion, not least because the Malaysian courts are now heavily engaged in the proceedings there both at first instance and appellate level in a way that simply would not have been so had Euronav applied for and obtained ASI relief much sooner than it did. Even if the focus concerning timing should be upon the AAI application in the Malaysian proceedings, that had been issued in excess of a month before the application before me, and the application I am considering was issued at a time when each of the parties had filed comprehensive evidence in relation to the

AAI application to the High Court of Malaysia. The without notice hearing before me took place 2 days before the hearing before the High Court of Malaysia.

61. It is no more objectionable for BSP to seek the orders it seeks from the Malaysian courts than it would be for such relief to be sought from the English Court in relation to a foreign seated arbitration. As I have said the English court has jurisdiction to make such orders – see Excalibur Ventures v. Texas Keystone (ibid.). Whilst a court might be tempted not to make such an order without first giving the parties an opportunity to apply to the tribunal for orders that would avoid duplicative proceedings either by determining its jurisdiction as a preliminary issue or by staying the proceedings, that point does not arise here. BSP applied for both but without success.

62. In summary, if I granted the order sought I would be approving the continuation of the race to judgment that I have identified and actively facilitating the possibility of conflicting judgments and findings with all the consequences that flow from that. In my view that is something that simply cannot be justified where, as here, the applicant for such an order has voluntarily submitted to the jurisdiction of a court that otherwise has jurisdiction to determine the dispute. I am prepared to accept that arguably that discretionary consideration ought to be weighed differently if the Court of Appeal of Malaysia overturns that order but unless and until that occurs it would be a wrong exercise of discretion to make such an order.

Conclusions

63. At the outset of this judgment I identified three possible outcomes. For the reasons I have given it is not appropriate that I grant the order that Euronav seeks at this stage although the position may be different if the Court of Appeal of Malaysia overturns the decision of the High Court of Malaysia on the voluntary submission issue. By the same token, given the procedural position in Malaysia, it is not appropriate that I dismiss the application at this stage. That will simply generate more avoidable cost and delay. Provisionally (since I have not heard counsel on this issue) I consider the most appropriate course is to adjourn Euronav's application, with liberty to it to restore the application if so advised following final determination of Euronav's appeal concerning its submission to the jurisdiction of the Malaysian High Court.