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1 ARBITRATION

1.1 UNCITRAL PUBLISHES COMPILATION OF NEW YORK CONVENTION SURVEY RESULTS

In 1995, the UNCITRAL Secretariat and the Arbitration Committee of the International Bar Association surveyed the state parties to the New York Convention with the stated aim of monitoring the legislative implementation of the Convention, including court interpretation and the procedural mechanisms put into place by states to make the Convention operative. The central issues for consideration were:

- How the Convention was incorporated into the national legal system, so that its provisions had the force of law.
- In implementing the Convention, whether state parties had added to the uniform provisions.
- Whether reservations made at a national level had added or broadened the reservations permitted under the Convention.
- Whether state parties had imposed additional requirements for the recognition and enforcement of awards.

As of February 2008, 108 state parties (of the 144 in total) had responded to the survey, providing valuable information on the interpretation and application of the Convention in their respective countries. UNCITRAL has now published a compilation of the survey results on its website. Note, however, that because some of the data in the compilation are based on responses made at the beginning of the project, the UNCITRAL Secretariat is urging states to check the facts and, where necessary, to provide further information to ensure accuracy.

1.2 JURISDICTIONAL CHALLENGE FALLS OUTSIDE ARBITRATION ACT

Ramsey J considered an application for a declaration that an arbitrator had no jurisdiction to determine disputes between the parties. He held that there was no binding arbitration agreement between the parties and therefore the Arbitration Act 1996 did not apply. He went on to grant the declaratory relief sought pursuant to the court's inherent jurisdiction, rather than pursuant to the provisions of the Act.

Ramsey J's analysis (which requires the court to determine, as a threshold issue, the question of whether any arbitration agreement exists) appears to run counter to previous authority and was not intended by the authors of the Act. The practical implication of his decision is that it would appear that an application for a declaration that there is no binding arbitration agreement (made pursuant to the court's inherent jurisdiction, rather than pursuant to the Act) could be made by way of a Part 8 claim form, rather than in an arbitration claim form. Practitioners should perhaps consider including both types of claim where they apply to court to challenge jurisdiction.

1.3 WHETHER COURT HAD JURISDICTION TO GRANT APPLICATION FOR PRE-ACTION DISCLOSURE

In the case of *Edo Corporation v Ultra Electronics Ltd [2009] 2 Lloyd's Rep. 349* the applicant (U) applied for a stay under the Arbitration Act 1996 s.9 (http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960023_en_2#pt1-pb3-l1g9) of an application by the respondent (E) for pre-action disclosure. U had been appointed as a sub-contractor for the manufacture of a sonar system to be used on a Royal Navy aircraft. U had then entered into a sub-contract with E for the supply of the sonar equipment. The sub-contract with E contained terms providing for any dispute between E and U arising out of the agreement to be referred to arbitration. U subsequently won a separate contract to provide sonar systems to the Australian Navy. There were similarities between the two sonar systems and it was E's belief that U had misused proprietary information belonging to E in breach of the terms of the sub-contract. E applied for pre-action disclosure of a significant part of U's tender documents under the Supreme Court Act 1981 (now the Senior Courts Act 1981) s.33(2) (http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1981/cukpga_19810054_en_4#pt2-ch2-pb4-l1g35) on the basis that it was not possible to ascertain whether E had any substantive
dispute with U or, if such a dispute existed, its nature and ambit, without sight of that documentation.

The issues for determination by the court were (i) whether the procedure for pre-action disclosure in s.33(2) and CPR r.31.16 was available to a party where the underlying dispute arose out of a contract which required any dispute to be determined by arbitration; (ii) whether, if such an application was available, the Arbitration Act 1996 s.9 enabled the court to stay it. E submitted that the power to stay legal proceedings under s.9 of the 1996 Act only applied where legal proceedings had been brought and its application for pre-action disclosure was an application prior to legal proceedings. E also argued that the court had jurisdiction to award interim and conservatory measures, including pre-action disclosure, under the International Chamber of Commerce rules of arbitration r.23.

The application for pre-action disclosure was dismissed. (1) Section 33(2) of the 1981 Act did not confer jurisdiction on the court to make an order for pre-action disclosure in aid of the arbitral process as it did not appear that E was likely to be a party to proceedings in the High Court. There was no sign that either party intended to litigate in the High Court as the matters which were likely to be in dispute were of commercial confidentiality. If E issued a claim in the High Court, U was likely to obtain a stay under s.9 of the 1996 Act and that could only mean that E was seeking pre-action disclosure for purposes ancillary to process in arbitral proceedings. That was not the purpose for which the provision was enacted and was outside the jurisdiction conferred by the 1996 Act. Had it been the intention of the legislature to grant to those who were likely to be parties to arbitral proceedings similar ancillary assistance to that provided by s.33(2), it would have made express provision to that effect either in the 1981 Act, or, more probably, within s.44(2) of the 1996 Act. The court was not empowered by s.9 of the 1996 Act to stay the sort of application envisaged by s.33(2) of the 1981 Act because such an application was not "legal proceedings" of the type specified in s.9, and the claim for pre-action disclosure could not be described as the substantive claim.
(2) The fact that s.33(2) of the 1981 Act did not apply to applications in support of arbitral proceedings was a good reason for concluding that s.9 of the 1996 Act did not apply. However, that was something of a circular argument since if the court had been persuaded that E could bring an application for pre-action disclosure, that would have led to the opposite conclusion on s.9, and a stay would probably have been ordered.

(3) The International Chamber of Commerce rules did not apply as neither party had formulated a substantive claim and an application under s.33(2) was not meant to be included within the phrase "interim or conservatory measures" in the ICC rules r.23. The International Chamber of Commerce was not a body which had the power to grant to the High Court a jurisdiction beyond that which the legislature had endowed it. An application for pre-action disclosure did not come within the powers given to the court by s.44(2) and s. 44(3) of the 1996 Act, and, where the power was not expressly given by the section, the court did not have residual power to grant the relief sought. As s.33(2) of the 1981 Act did not apply to E's application, the appropriate order was not to stay E's application but to dismiss it.
2 COSTS

2.1 COSTS CAPPING ORDER REFUSED

In *Barr & Others v Biffa Waste Services Ltd (No 2) [2009] EWHC 2444 (TCC)* (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2009/2444.html&query=Barr+and+Others+and+Biffa+and+Waste+and+Services+and+Ltd&method=boolean), the defendant sought an order capping the costs recoverable by the claimants to the amount of the claimants' after-the-event (ATE) insurance policy.

The court refused to make the order. It held that it was not appropriate to impose a cap on the claimants' costs equivalent to the amount of the ATE policy. Moreover, it was not possible to say that the claimants' future costs would be disproportionate within the meaning of CPR 44.18 so the court had no jurisdiction to make an order under that rule in any event.

However, the court recognised that there was a substantial imbalance in the commercial risks being taken by the parties in the litigation. To address this imbalance and provide more certainty for the defendant, the court ordered that the costs recoverable by the claimants would be limited to the amount of their estimate at that time. This order was made under the court's general powers under CPR 43 and therefore outside the constraints of CPR 44.18.

Although the provisions relating to costs capping orders in CPR 44.18 have only been in force since April 2009, this case illustrates that the rules may not adequately deal with cases where the parties are not on a level commercial playing field. The judgment suggests that CPR 44.18 may be invoked only in very unusual cases.

2.2 THIRD PARTY COSTS ORDERS

In *Hitachi Capital (UK) PLC v V-12 Finance Limited (now named Box Red Limited) and others [2009] EWHC 2432 (Comm)* (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2432.html&query=Finance+and+Limit...
ed&method=boolean), the court considered applications for third party costs orders under section 51 of the Supreme Court Act 1981 (now known as the Senior Courts Act 1981).

Non-parties were ordered to pay costs on the basis that they had promoted and funded proceedings by an insolvent company solely or substantially for their own financial benefit.

The second application was not brought by the claimant but by the third parties against whom the claimant sought a costs order: a scenario that was not directly covered by existing authorities. The judgment considers the appropriate procedural approach in these circumstances. It also provides a reminder of the need to notify third parties that costs orders are to be sought against them.
3 EU

3.1 **ARTICLE 6 OF THE UNFAIR TERMS DIRECTIVE HELD TO HAVE EQUAL STANDING TO A MEMBER STATE’S PUBLIC POLICY RULES**

In *Asturcom Telecommunications SL v Maria Cristina Rodriguez Nogueira*, (Case C-40/08) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/EUECJ/2009/C4008.html&query=Nogueira&method=boolean) the ECJ held that Article 6 of the Unfair Terms Directive (93/13/EEC) must be regarded as having equal standing to national rules of public policy because of its importance for consumer protection. It also held that under the Unfair Terms Directive, a national court or tribunal hearing an action to enforce a final arbitration award made without the consumer being present must assess of its own motion whether an arbitration clause in the consumer contract is unfair. If that is the case, it is for that court or tribunal to apply national law to ensure that the consumer is not bound by that clause.

3.2 **EU DIRECTIVE ON SECURITY OF OIL SUPPLY**

This EU Directive lays down rules aimed at ensuring a high level of security of oil supply in the Community through reliable and transparent mechanisms based on solidarity amongst Member States, maintaining minimum stocks of crude oil and/or petroleum products and putting in place the necessary procedural means to deal with a serious shortage. Directives 73/238, 2006/67 and Decision 68/416 to be repealed with effect from December 31, 2012. The Directive enters into force on October 29, 2009, and must be implemented by the Member States by December 31, 2012. Member States that are not members of the International Energy Programme (IEA) by December 31, 2012, and cover their inland consumption of petroleum products fully by imports must implement art.3(1) of this Directive by December 31, 2014.

3.3 **EU RULING IN RELATION TO ARTICLE 4 OF ROME CONVENTION**

In the case of *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and another* [2009] All ER (D) 71 (http://www.bailii.org/cgi-
The Court of Justice of the European Communities gave a preliminary ruling relating to art 4 of the Convention on the Law applicable to Contractual Obligations concerning a Belgian claimant company, and the two defendant companies established in the Netherlands, the former seeking an order for the payment by the defendant companies of unpaid invoices which had been issued on the basis of a charterparty entered into by the parties.

The questions before the Court were: (i) whether art 4(4) of the Rome Convention (http://www.opsi.gov.uk/acts/acts1990/ukpga_19900036_en_2#sch1) applied to charter-parties other than single voyage charter-parties and which factors allowed a charter-party to be categorised as a contract of carriage for the purposes of applying that provision to the contract at issue in the main proceedings; (ii) in which circumstances it was possible, under the second sentence of art 4(1) of the Rome Convention, to apply different national laws to the same contractual relationship, in particular as regards the limitation of the rights under a contract. Further, the referring court asked, inter alia, whether, if the connecting criterion provided for in art 4(4) of the Rome Convention applied to a charter-party, that criterion related only to the part of the contract concerning the carriage of goods; and (iii) whether the exception in the second clause of art 4(5) of the Rome Convention had to be interpreted in such a way that the presumptions in art 4(2) to (4) of the Rome Convention would not apply, only if it was evident from the circumstances in their totality that the connecting criteria indicated therein would not have any genuine connecting value, or whether the court would have to also refrain from applying them if it was clear from those circumstances that there was a stronger connection with some other country.

The Court ruled that (i) The last sentence of art 4(4) of the Rome Convention had to be interpreted as meaning that the connecting criterion provided for in the second sentence of art 4(4) applied to a charter-party, other than a single voyage charter-party, only when the main purpose of the contract had not merely been to make available a means of transport, but the actual carriage of goods; (ii) the second sentence of art 4(1) of the Rome Convention had to be interpreted as meaning that a part of a contract might be governed by a law other than that
applied to the rest of the contract only where the object of that part had been independent; further, where the connecting criterion applied to a charter-party had been that set out in art 4(4) of the Rome Convention, that criterion had to be applied to the whole of the contract, unless the part of the contract relating to carriage had not been independent of the rest of the contract; and (iii) Article 4(5) of the Rome Convention had to be construed as meaning that, where it had been clear from the circumstances as a whole that the contract had been more closely connected with a country other than that determined on the basis of one of the criteria set out in art 4(2) to (4) of the Rome Convention, it would be for the court to disregard those criteria and apply the law of the country with which the contract had been most closely connected.
4 INSURANCE

4.1 LAW APPLICABLE TO REINSURANCE – PLACE OF PERFORMANCE OF REINSURER’S OBLIGATIONS UNDER THE REINSURANCE

In the case of *Gard Marine & Energy Ltd v Lloyd Tunnicliffe – [2009] EWHC 2388 (Comm)* (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2388.html&query=Gard+and+Marine+and+Energy+and+Ltd+and+v&method=boolean) the claimant insurance company, incorporated in Bermuda, insured a US energy company. The claimant, through an existing reinsurance scheme with its London based Lloyd's brokers, the first defendant, sought to reinsure the risk under two excess of loss reinsurance slips. One placement was made with four London market underwriters, for 7.5% and one with a Swiss underwriter, the second defendant, for 5%. The London market slip was subject to an express choice of English law and jurisdiction. There was no such express choice on the other slip. In 2005, the energy company sustained damage to its insured interests in the Gulf of Mexico by reason of Hurricane Rita and presented a claim up to the full limits of the policy. Following settlement of the underlying claim, the claimant made claims against its underwriters. A dispute arose as to amounts payable. The claimant commenced an action for recovery of the sums owed, in the English courts. The final claim was against the first and second defendant and one of the London market underwriters, the third defendant. The instant hearing was concerned with a challenge by the second defendant to the court's jurisdiction.

The claimant submitted: (i) that the English court had jurisdiction pursuant to art 5(1) of the Lugano Convention (http://www.jus.uio.no/ mm/ce.efta.jurisdiction.enforcement.judgements.civil.commercial.matters.lugano.convention.1988/doc.htm#1) because the relevant contractual obligation was to be performed in London pursuant to an alleged custom and practice of the London market; alternatively (ii) that it was an implied term that claims would be paid in London; and (iii) that the court had jurisdiction pursuant to art 6(1) of the Convention, because the claim against the Swiss company was intrinsically connected with the claim against the English insurer and the broker and there would be a risk of irreconcilable judgments. The second defendant submitted: (i)
that under art 5(1) of the Convention it was necessary for the claimant to establish an obligation to pay claims to the brokers in London, a practice of doing so was insufficient; (ii) that the test for irreconcilability had not been made out; and (iii) that in any event the court should exercise its discretion to decline jurisdiction under art 6(1) of the Convention. The law applicable was determined by the court.

The court ruled: (1) on the facts the claimant had established at least a good arguable case that English law was the applicable law. The underlying policy was a London market policy which was governed by English law, as was not disputed. The brokers were London based Lloyd's brokers who were offering the Swiss underwriters a share of an existing reinsurance programme. In reality therefore it was not a Swiss market placement. It was a case of a Swiss reinsurer being invited to participate in a London market placement. The use of a Lloyd's slip and policy pointed towards a choice of English law. The case would be heard in England.

(2) There was no arguable case that the English court had jurisdiction under art 5(1) of the Convention. The claimants had failed to establish that there was an obligation to pay claims to the brokers in London. A practice of doing so was insufficient. There were no particular features of the reinsurance policy that supported the implication of the term suggested and in any event there was insufficient evidence of practice or custom to found the required implication.

(3) The issue under art 6(1) of the Convention was whether there was such a connection between the claims at the time when they were instituted that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The risk of irreconcilability could arise from potential conflicting findings of fact or from potential conflicting decisions on questions of law.

In order that decisions might be regarded as contradictory it was not sufficient that there was a divergence in the outcome of the dispute, that divergence had also to arise in the context of the same situation of law and fact. It was overwhelmingly just, convenient and expedient that the claimant's claims be determined in one jurisdiction. If the claims were heard in different jurisdictions, there was a risk that the different courts might reach different conclusions on
this central construction issue. English law applied to the reinsurance contract between the 
claimant and the defendant Swiss underwriter. Further, England was the correct jurisdiction to 
hear the claims in order to avoid the risk of irreconcilable judgments.

4.2 DUTY OF UTMOST GOOD FAITH – PROPER CONSTRUCTION OF 
QUESTION IN PROPOSAL FORM

In the case of R&R Developments Ltd v AXA Insurance Ltd [2009] EWHC 2429 (ch) 
(http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2009/2429.html&query=developments+and+limited+and+AXA&method=boolean) the claimant assured took out a Commercial Combined and 
Contract Works policy in respect of a small development. The proposal form asked the 
question: "Have you or any Partners or Directors either personally or in connection with the 
business in which they have been involved ... ever been declared bankrupt or are the subject 
of any bankruptcy proceedings or any voluntary or mandatory insolvency?". The assured 
answered this question in the negative. One of the assured's directors was a director of a 
company in administration at the date the proposal form was completed. The insurers 
purported to avoid the policy on the grounds of misrepresentation. The court held that there 
was no misrepresentation. (1) Where there was an ambiguity in the question, the contra 
proferentem principle was to be applied to it. The meaning was to be assessed on an objective 
rather than subjective basis. (2) There was no ambiguity here. The question by its terms did 
not ask about the insolvency of companies with which directors had been involved, but only 
about the insolvency of the directors themselves. Had the word "involved" extended to 
companies, it would have been very wide and uncertain in meaning. Further, in asking about 
past losses, the proposal was concerned only with claims by individuals. (3) Had the question 
been ambiguous, the same result would have been reached by the application of the contra 
proferentem principle. (4) In any event, the fact that a limited question relating to individual 
insolvency had been asked meant that disclosure of information as to corporate insolvency 
had been waived.
5 JURISDICTION

5.1 ROME I: EUROPEAN COUNCIL PUBLISHES CORRIGENDUM

Rome I is aimed at standardising the rules for determining applicable law so as to extend the harmonisation of private international law in the European Union, and reduce the risk of forum shopping. On 22 December 2008 the European Commission issued a Decision (2009/26/EC) confirming that Rome I will apply in the UK.

Article 29 (Entry into force and application) provides that Rome I will apply "from 17 December 2009 except for Article 26 which shall apply from 17 June 2009". However Article 28 (Application in time) states that: "This Regulation shall apply to contracts concluded after 17 December 2009". Clearly there is an inconsistency in the wording.

On 8 October 2009, the European Council published a corrigendum to Rome I, under procedure 2(c) on the basis that there has been an obvious error in all language versions.

This clarifies that the Regulation "shall apply to contracts concluded as from 17 December 2009".

5.2 EXCLUSIVE JURISDICTION AGREEMENTS AND NON-PARTIES

In Morgan Stanley & Co International Plc v China Haisheng Juice Holdings Co Ltd [2009] EWHC 2409 (Comm) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2409.html&query=Morgan+and+Stanley+and+Co+and+International+and+Plc+and+v+and+China+and+Haisheng+and+Juice+and+Holdings+and+Co+and+Ltd&method=boolean), the court had to consider the question of whether an exclusive jurisdiction clause in favour of the English courts extended to claims against an entity that was not a party to the agreement. The exclusive jurisdiction clause was contained in an agreement between the parties based on the ISDA Master Agreement.

The parties to the agreement were MSIP and CH. MSIP commenced proceedings in the English courts against CH. CH commenced proceedings in the Chinese courts against MSIP and one of its affiliates, MSAL. The court held that the jurisdiction clause could not reasonably be understood to mean that MSIP and CH had agreed that claims arising out of, or
in connection with, the agreement were to be submitted to the English court, regardless of whether the claims were against the other party or a non-party. Although the court granted an anti-suit injunction to restrain CH’s claim against MSIP in the Chinese courts, it declined to grant an anti-suit injunction to restrain CH’s claim against MSAL in China. It also declined to grant CH’s application for a stay of MSIP’s claim against it in the English court.

The inevitable and unsatisfactory outcome of this, as acknowledged by the court, was the possibility of inconsistent decisions from the English and Chinese courts. However, as the case highlights, where the parties have entered into an exclusive jurisdiction agreement, they will generally not be entitled to seek to persuade the court to weigh up the relative merits of the dispute being pursued in the agreed forum or another jurisdiction.
6 MISCELLANEOUS

6.1 ROTTERDAM RULES GAIN MOMENTUM AS 20TH STATE SIGNS

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules, has received its 20th signature just one month after it first opened for signature. Niger became the 20th signatory to the Rotterdam Rules.

The signing ceremony for the Convention was held in Rotterdam on 23 September 2009. Sixteen States signed the Convention on the opening day, making it the most successful of the conventions developed by UNCITRAL so far in terms of signatures obtained on opening day.

The States signing the Convention upon its opening for signature in Rotterdam were: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America.

Joining the initial 16 States in signing the Convention since were: Armenia, Cameroon, Madagascar and Niger. The 20 signatories represent a mix of developing and developed countries, including several major trading and maritime nations. Together, the 20 represent over 25 per cent of current world trade volume according to the United Nations 2008 International Merchandise Trade Statistics Yearbook. The Convention needs 20 ratifications to enter into force.

6.2 PROGRESS REPORT BY EUROPEAN COMMISSION ON INTEGRATED MARITIME POLICY

The European Commission has presented a Progress Report outlining the achievements of the EU's Integrated Maritime Policy over the past two years and identifying priorities for the next Commission. See the report at: http://rswebapps/RefTracker/default.aspx?mi=SDWd5g

6.3 MERCHANT SHIPPING (ANTI-FOULING SYSTEMS) REGULATIONS

The Merchant Shipping (Anti-Fouling Systems) Regulations 2009 (SI 2009/2796)
(http://www.opsi.gov.uk/si/si2009/uksi_20092796_en_1) come into force on 1st December 2009. In so far as it is necessary to do so, these Regulations give effect in the UK to Regulation 782/2003 (on the prohibition of organotin compounds on ships) and make supplementary provision in relation to Annex I of the EC Regulation, which concerns survey and certification of ships for anti-fouling purposes. In particular, they prohibit certain ships from proceeding on a voyage without the anti-fouling certificates or other documentation specified in the Regulations.

6.4 European Commission Proposal on Carbon Dioxide Emissions To Include Shipping Industry

The EU seeks to include ships and aircraft in climate accord. Aviation and shipping industries would be included in global carbon-reduction measures for the first time, under a European Commission proposal, to be tabled at the Copenhagen climate conference in December 2009. See www.ft.com – use ‘ships aircraft’ to search for article.
7 PRACTICE

7.1 SERVICE OUT OF THE JURISDICTION- CONTRACT WAS MOST CLOSELY CONNECTED WITH ENGLAND

In *Pablo Star Limited v Emirates Integrated Telecommunications Company PJSC (T/A Du)* [2009] EWCA Civ 1044, the claimant-appellant, Pablo Star (PS), was an English company. The defendant-respondent (Du) was a Dubai company. PS applied for permission to serve out of the jurisdiction in relation to breach of an alleged contract between the parties on the basis that (i) there was a provision in the contract giving the English court jurisdiction (*Article 23, Brussels Regulation*) ; (ii) the contract was governed by English law (*PD 6B 3.3.1(6)(c)*) and (iii) Du had breached the contract within the jurisdiction (*PD 6B 3.3.1(6)(d)*).

Du challenged the jurisdiction of the English court and contested the grant of permission to serve out. Du's primary points, raised for the first time on the application to set aside service out, were that the Contract, in fact, stipulated Dubai law, that it contained an arbitration clause and also a term requiring sensible negotiation before litigation costs were incurred.

At first instance, it was held that the English court did not have jurisdiction to hear the dispute. The Dubai choice of law provisions had been incorporated and any breach of contract had occurred in Dubai. Service was set aside. PS obtained permission to appeal to the Court of Appeal.

The Court of Appeal had to decide the following questions:

(1) Had a Dubai choice of law provision been incorporated into the Contract? If not, had an English choice of law provision been incorporated?
(2) If no English choice of law provision had been agreed, with which law was the Contract most closely connected?

(3) If English law, was England the proper place for the claim to be brought?

With regard to incorporation of choice of law provisions in the contract, the question was whether the reference to Du's terms and conditions at the bottom of various e-mails sent by Du to PS meant that they had been incorporated into the contract (no such terms were ever attached). The Court held that the answer to this question was no. If Du sought to incorporate the Dubai choice of law and arbitration provisions they had to do so in a way that was reasonably sufficient to draw that to PS's attention. Not attaching such terms made it "practically unarguable" that they had done sufficient.

However, this did not automatically lead to the conclusion that English choice of law and jurisdiction provisions had been incorporated. It was arguable that Du's failure to put forward a counter-proposal led to PS's term being incorporated. But it was not sufficiently clear that that was the correct answer because both parties left over the agreement of the detail, and it was arguable that what they had agreed stood alone without PS's standard terms being incorporated. The Court of Appeal held that a Dubai choice of law provision had not been incorporated into the contract, neither arguably had an English law choice of law provision.

With which country was the contract most closely connected? The parties agreed that, under Article 4(2) of the Rome Convention, as enacted into English law by the Contracts (Applicable law) Act 1990 http://www.opsi.gov.uk/acts/acts1990/ukpga_19990036_en_1, there was a presumption in favour of the law of the place of business of the person who was to effect characteristic performance of a contract. PS was that party. The question was whether Du could bring itself within the Article 4(5) exception by demonstrating that the Contract was more closely connected with Dubai. The Court of Appeal assessed the factors linking the Contract to each of the two countries. The Court concluded that PS had "much the better of the argument" that the contract was most closely connected with English law. Accordingly, the English court had been entitled to take jurisdiction under PD 6B.3.3.1(6)(c). England was the proper place for the claim to be brought. The position regarding the
convenience of witnesses was evenly balanced. However, the factor ultimately weighing in favour of England was the fact that the contract, if established, was likely to be found to be governed by English law. Accordingly, it was more convenient to try the case in England.

The points of interest in this case include:

- A reminder of the need for caution when parties are seeking to conclude a contract by means that include the exchange of their (differing) standard terms; and the time and costs implications of jurisdictional challenges that may arise when dispute resolution provisions are not adequately reviewed at the contacting stage.

- The matters that the court will consider when assessing with which country a contract is most closely connected for the purpose of Article 4 of the Rome Convention. Note, however, that Council Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I) applies to contracts concluded as from 17 December 2009 (replacing the Rome Convention). Under Rome I, eight types of contracts are identified and, for each type of contract, a test is specified to establish the applicable law.

- The need for proportionality in dispute resolution. In this case, one party claimed costs equal to the value of the claim before the matter had gone to the Court of Appeal, which the Court noted with regret.

7.2 Service - Meaning of "Usual or Last Known Residence"

The decision in Relfo Limited (in liquidation) v Varsani [2009] EWHC 2297 (Ch) related to an application to set aside service of a claim form in England. The relevant test was whether there was a good arguable case that the claim form had been served at an address that was the defendant's "usual or last known residence" within the meaning of CPR 6.9(2).

The court noted that it was possible for an individual to have more than one residence. It said that it was necessary to consider the "quality" of the usage of the property, not simply how much time the defendant spent there. The court held that the quality of the defendant's
occupation of the property was as a home. Accordingly, the necessary test for the claim form to be served at a "usual" address of the defendant had been satisfied. It was not, therefore, necessary for the court to consider whether the property was the defendant's "last known residence". However, it was noted that this phrase did not denote that the residence was one where the defendant was no longer resident.

7.3 SERVICE OUT OF THE JURISDICTION – METHOD OF SERVICE

In the case of Olafsson v Foreign and Commonwealth Office [2009] All ER (D) 224 (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2009/2608.html&query=Olafsson+and+v+and+Foreign+and+Commonwealth+and+Office&method=boolean) the court said that it was not unreasonable for a claimant to pursue the Foreign and Commonwealth Office for damages in respect of their admitted negligence in failing to properly serve defamation proceedings in Iceland, rather than issuing further proceedings and seeking to enforce them in Iceland.

The claimant (O) claimed damages against the defendant government department for negligence in respect of a failed attempt to serve proceedings in Iceland. O had issued defamation proceedings against an Icelandic professor (G) and obtained an order for service in Iceland. The defendant purported to serve the proceedings, and in due course O obtained judgment in default and damages were assessed. However, G successfully set aside the judgment on the grounds that there had been defective service. O then obtained an order dispensing with service of further proceedings. G's appeal against that order failed. O sought to recover from the defendant the loss of the default judgment, wasted costs in attempting to enforce the default judgment, costs paid to G, the costs of defending G's appeal, and compensation for inconvenience. The defendant admitted liability but contended that O should have mitigated his loss by obtaining a second default judgment and enforcing it.

HELD: Under the Lugano Convention 1988 art.27(2), Iceland was not obliged to recognise a judgment, if given in default of appearance, where the defendant "was not duly served" with the claim form or equivalent document. The fact that G had applied to set aside the first default judgment did not affect the question of whether he might default in appearance in
respect of the hypothetical second default judgment. The fact that G had been aware of the proceedings for some time did not equate to due service. As the concept of dispensing with service was alien to Icelandic law and procedure, it was likely that a court in that jurisdiction would interpret the requirements strictly. Non-service could not be equated with due service, and service of the order dispensing with service was not service of a document that was equivalent to the claim form. An equivalent document had to convey the sense of the document to be served, such as a translation of the claim form. It was unlikely that an Icelandic court would enforce a second default judgment. Accordingly, O was not acting unreasonably in seeking to recover his loss from the defendant and he should not be required to undertake further litigation against G.

7.4 IGNORE E-DISCLOSURE OBLIGATIONS AT YOUR PERIL

In Timothy Duncan Earles v Barclays Bank PLC [2009] EWHC 1 (Mercantile) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Mercantile/2009/2500.html&query=timothy+duncan+earles&method=boolean), the court had to decide whether to believe the evidence of the claimant, a customer of the defendant bank, or that of the defendant, as to whether the claimant had authorised and instructed the defendant to process certain bank transfers. The claimant's case was that he had not authorised these transfers from his own personal business account to the account of a company of which he was, at the relevant time, a director. He claimed that as a result of these unauthorised bank transfers, when the company went into administration, he suffered consequential loss and damage of approximately GBP2.4 million.

The primary issue for the court to decide was whether certain telephone calls and e-mails, which the defendant claimed were made by the claimant, authorising the transfers were, in fact, made. The interesting point arising from this case was that there was a lack of disclosure on both sides, and in particular, a lack of e-disclosure of key documents, including e-mails from key bank personnel, despite the defendant being represented by "first class legal teams, both in and out house". Judge Simon Brown QC concluded that the failure to disclose such documents rested on erroneous decisions on relevance and proportionality by the defendant's
legal team, rather than being to gain any tactical advantage in the litigation, and ultimately decided the merits of the case in the defendant's favour. However, he was extremely critical of the defendant's failure to give proper disclosure, particularly e-disclosure. He concluded that there can be no excuse, and that it is "gross incompetence" for those practising in the civil courts not to know the rules on e-disclosure, or to practice them. He penalised the defendant by awarding it only 25% of its costs.

The case should serve as a warning to litigation lawyers and their clients to think about e-disclosure at an early stage in the litigation process and to have in place proper procedures so that electronic documents can be quickly located, particularly in relation to employees who may have left a client's employment by the time a dispute arises.

7.5 INFORMATION DISCLOSED UNDER FREEZING ORDER: CAN IT BE USED AT TRIAL?

In *Cadogan Petroleum Ltd and others v Tolley and others [2009] EWHC 2527 (Ch)* (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2009/2527.html&query=Cadogan+and+Petroleum+and+Ltd+and+tolley&method=boolean), it was held that the court may permit information provided in cross-examination by a respondent to a freezing injunction to be used as evidence at trial. In reaching this decision, the court followed the approach in *Dadourian Group International Inc and others v Simms and others [2006] EWCA Civ 1745* (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/1745.html&query=Dadourian+and+Group+and+International&method=boolean); namely, that the relevant test for the court is, on the basis of all the circumstances of the case, whether it is just and convenient for the information to be so used.

This decision is important to all those who are ordered to make disclosure under a freezing order, and their legal advisors.
7.6 TRANSFERRING PROCEEDINGS BETWEEN COURTS

Whilst the case of *NATL Amusements (UK) Ltd and others v White City (Shepherds Bush) Ltd Partnership and another* [2009] EWHC 2524 (TCC) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2009/2524.html&query=NATL+and+Amusements&method=boolean), was a Technology and Construction Court case, the TCC considered the rules governing the transfer of proceedings between any divisions of the High Court. The court confirmed that:

- Any division of the High Court has the power to order proceedings in another division to be transferred to it (CPR 30.5(1)).
- An application to transfer proceedings to a specialist court (such as the TCC), must be made to a judge in that court (CPR 30.5(1) and (2)).
- The court's power is discretionary and must be exercised in light of the CPR's overriding objective (CPR 1.2).

The court found that, when considering whether to exercise its discretion to transfer proceedings, relevant factors include:

- Which issues will occupy the bulk of the time, cost and resources on a case, and which venue has judicial expertise in those areas. If there is little difference between the two proposed venues, the court will generally exercise its discretion to prevent transfer of proceedings.
- Whether one court is clearly able to deal with a matter more swiftly or at a lower cost to the parties. The overriding objective recognises both of these factors as relevant.

7.7 SECURITY FOR COSTS AGAINST IRANIAN CLAIMANTS

Qureishi+and+Kahangi&method=boolean), the court granted security for costs against the claimants, several of whom were resident in Iran.

Under CPR 25.13(1), an applicant for security for costs must satisfy the court that, having regard to all the circumstances of the case, it is just to make such an order and that one or more of the conditions set out in CPR 25.13(2) applies. One such condition (CPR 25.13(2)(a)) is that the claimant is resident out of the jurisdiction, but not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 (the Contracting States). Granting the application, Eady J noted that it was important that there was no discrimination against those resident outside the Contracting States. To grant an application based on CPR 25.13(2)(a), the applicant also had to demonstrate that there would be significant additional obstacles to enforcement within the relevant foreign jurisdiction.

The interesting point here was that the defendant sought to support the application by evidence mainly from publicly available journals to show that enforcement in Iran would be difficult or impossible, because it was unable to obtain any firm evidence from an Iranian lawyer about enforceability in Iran. While general allegations about the lack of judicial independence would not be sufficient, there was important evidence here that government representatives had threatened the defendant and further, the Iranian Constitution required judges to function under the "absolute rule of the Supreme leader", thereby suggesting that there would be serious problems of enforcement of a costs award. In reaching his decision, the judge had considered the claimants' probability of success in the underlying dispute, and allegations that the original publications and the defendant's application had been made in bad faith.

The judge emphasised that evidence of threats by government representatives was a relevant factor in assessing the likelihood of enforcement for this defendant against these claimants. However, practitioners acting in similar circumstances, where allegations of obstacles to enforcement are made, should be alive to the possibility of such arguments being made and the possible implications for their clients.
7.8 **PART 36 OFFER CAN BE ACCEPTED AFTER IT HAS BEEN REJECTED**

In *Sampla v Rushmoor Borough Council and Crowley* [2008] EWHC 2616 (TCC) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2008/2616.html&query=Sampla+and+v+and+Rushmoor+and+Borough+and+Council&method=boolean), the claimants' claim had been settled and the trial of the issue of contribution between the defendants was almost complete. D1 sought the court's permission to accept a Part 36 offer made by D2, which D1 had previously rejected. The court refused to grant permission on the bases that:

- The parties' perception of the likely outcome of the trial had significantly changed since the offer had been made.
- The trial was almost complete, so settlement at that stage would result in only modest cost savings.

The judgment is interesting in that it held, as a matter of principle, that a party can accept a Part 36 offer even if he has previously rejected it. This is understood to be the first decision on this point since the present version of CPR 36 came into force in April 2007.

7.9 **ENFORCEMENT ACTION STAYED IN LIGHT OF KOREAN INSOLVENCY**

The case of *D/S Norden A/S v Samsun Logix Corp & Ors* [2009] EWHC 2304 (Ch) concerned international co-operation in insolvency proceedings under the UNCITRAL model law on cross-border insolvency. S was subject to insolvency proceedings in Korea. The English court, having recognised the Korean insolvency proceedings, had granted a stay on creditors issuing proceedings against S and its property.

N applied for permission to enforce a contractual lien arising under a contact governed by English law. The validity of the lien was the subject of litigation in Korea. The court refused N's application to enforce the lien on the basis that, if N enforced the lien, that enforcement would pre-empt the outcome of the Korean litigation.
N argued that the court's decision effectively forced it to submit to the jurisdiction of the Korean court. N's concern was that, if the Korean court held that the lien was invalid, it would preclude N from attempting to enforce the lien in England. The court recognised this as a valid concern and provided that, in any subsequent English proceedings, no issue could be taken that N was estopped from challenging a Korean court order that the lien was invalid by virtue of having participated in proceedings in Korea. The court's decision sought to balance the interests of the creditor, while avoiding inconsistencies with overseas proceedings.

7.10 NO STRONG REASONS FOR NOT ENFORCING EXCLUSIVE JURISDICTION CLAUSE

In Bank of New York Mellon v GV Films [2009] EWHC 2338 (Comm) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2338.html&query=Bank+and+of+and+New+and+York+and+Mellon&method=boolean), Field J considered the nature of a jurisdiction clause that was silent as to whether it was exclusive or non-exclusive. He ruled that the true construction of the clause, together with the application of case law authority, meant that the clause was exclusive as far as the defendant was concerned. He also found that on the facts there were no strong or sufficient reasons for not enforcing the jurisdiction clause.

The case turned on the grammatical construction of an obligation as transitive or intransitive, which is briefly summarised as follows: (i) A transitive verb takes a direct object - in jurisdictional terms, an example would be: "the parties submit their disputes to the jurisdiction of the English courts" and (ii) an intransitive verb does not take an object - in jurisdictional terms, an example would be: "the parties submit to the jurisdiction of the English courts". In a long stream of case law, it has been established that a transitive obligation creates an exclusive jurisdiction clause and an intransitive obligation will lead to a non-exclusive jurisdiction clause.

In relation to exclusive clauses, in Donohue v Armco Inc and Others [2001] UKHL 64 (http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2001/64.html&query=Donohue+and+v+and+Armco+and+Inc&method=boolean), the House of Lords ruled that where there is an exclusive
jurisdiction clause and a party applies to stay proceedings within the jurisdiction nominated by the clause, such an application will only succeed if that party can show strong reasons why that clause should not be enforced against it.

There were two applications before the court in this case:

- An application by the defendant (GV Films) to stay the English proceedings, on the grounds that there were proceedings before the Indian courts.
- An application by the claimant (the Bank) for an anti-suit injunction to restrain the Indian proceedings, on the grounds that they were brought in breach of an exclusive jurisdiction clause, or were vexatious and oppressive.

At the centre of both applications was the question whether the jurisdiction clause was an exclusive one so far as GV Films was concerned. The Bank relied on well-established existing lines of authority, which ruled that a transitive wording meant that the parties were taken to have intended the chosen court's jurisdiction to be exclusive in the absence of unusual circumstances.

GV Films contended that the word "exclusive" was not used in the clause and laid emphasis on the word "may" as opposed to "shall".

Mr Justice Field ruled in favour of the Bank and held that there were no sufficient or strong reasons for not enforcing the exclusive jurisdiction clause against GV Films. He granted the Bank's application for an anti-suit injunction restraining the Indian proceedings.

In relation to the jurisdiction clause, it was held that the true construction of the clause was that it was an exclusive jurisdiction clause so far as GV Films was concerned. The words: "The courts of England are to have jurisdiction to settle any dispute which may arise out of or in connection with this Trust Deed..." taken together with the express liberty conferred on the Bank, but not conferred on GV Films, to bring proceedings in any other court of competent jurisdiction, clearly showed that the intention of the parties was that the courts of England were to have exclusive jurisdiction so far as proceedings brought by GV Films were concerned.
In relation to the anti-suit injunction, the application for a stay of the English proceedings in circumstances where there was an exclusive English jurisdiction clause would only succeed if the applicant could show that there were strong reasons why the clause should not be enforced against it. There were no strong reasons in this case. Moreover, the judge noted that it was of considerable significance if a party expressly agreed not to rely on convenience arguments in resisting the jurisdiction of the nominated court. In such a case, especially strong grounds would be required before the exclusive jurisdiction clause could be departed from on grounds founded on convenience.

On the evidence before him, the judge decided that the Bank had not submitted to the jurisdiction of the Indian courts on the negative declaration proceedings and any appearance filed was under protest.

Although the decision applies existing law and turns largely on its facts, it is a reminder of the robust approach the courts will take to enforce contractual agreements, especially exclusive jurisdiction agreements.
8 SHIPPING

8.1 WHETHER CONTRACT REQUIRED VESSEL TO BE FIT TO GIVE NOTICE OF READINESS UNDER CHARTERPARTY OR JUST PHYSICALLY AND LEGALLY READY TO LOAD

Reed Smith acted for Bunge in the case of Soufflet Negoce v Bunge SA. [2009] EWHC 2454 (Comm) (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2454.html&query=Soufflet+and+Negoce+and+v+and+Bunge+and+SA&method=boolean). Soufflet Negoce was the seller (S) and Bunge was the buyer (B) under a contract of sale fob Nikotera, Ukraine of a consignment of feed barley with delivery on any of 14 consecutive days. The contract was on GAFTA form 49 terms. In arbitration, B claimed damages for failure to load the cargo. The vessel had given notice of readiness to load on the last day of the delivery period. S contended that on that day, the holds were unclean and thus not presented "in readiness to load" during the delivery period. B disputed this and called upon S to load after the 22 October. S's refusal to do so was treated as repudiatory by B. Upon appeal, S's contention was that the degree of readiness required was such that the vessel should be ready to load in all respects as would permit a valid notice by a shipowner to a voyage charterer for the commencement of laytime. B's contention was that the degree of readiness required was such that it was physically and legally possible for the sellers to load even if the circumstances did not justify the shipowner giving such notice. This was S's appeal against the award.

David Steel J dismissed the appeal, agreeing with the arbitration tribunal that a state of readiness warranting a Notice of Readiness under a voyage charterparty was not required. It was sufficient that the vessel was ready to load within the period. The claim was under a sale contract for failure to load and not for demurrage. B, the buyers under a fob contract, had provided a vessel, and it was S's duty to load whatever the state of the vessel. "Readiness to load" in the context of a sale contract meant physically and legally capable of loading and not ready to give an NOR. The vessel being "presented" in the terminology of the contract meant that: (i) the vessel had arrived at the port; (ii) it was moored at a suitable berth for loading; and (iii) there were no legal or physical restrictions on the sellers preventing them from obeying the buyers' orders.
8.2 NOTICE OF READINESS NOT INVALIDATED BY FAILURE TO OBTAIN FREE PRATIQUE

In the case of *AET Inc Ltd v Arcadia Petroleum Ltd* [2009] EWHC 2337 (Comm) on the true interpretation of the terms of a voyage charterparty a notice of readiness was not invalidated by the failure to obtain free pratique within six hours where the vessel had obtained free pratique by the time of berthing.

The claimant owners (C) claimed demurrage said to be payable under a voyage charterparty of an oil tanker to the defendant charterers (D). The charter was based on Part II of the Shellvoy 5 form together with Shell Additional Clauses - February 1999. Clause 13 of Part II dealt with the running of time and was supplemented by clause 22 of the Additional Clauses. Clause 22.1 provided that if owners failed to obtain free pratique within six hours after notice of readiness was tendered then the notice would not be valid. However, clause 22.5 and 22.6 provided that the presentation of the notice of readiness and the commencement of laytime would not be invalid where the authorities did not grant free pratique at the anchorage or other place but cleared the vessel when she berthed, and that under those conditions the notice of readiness would be valid unless the timely clearance of the vessel was caused by the fault of the vessel. Notice of readiness was tendered at the second load port, Escravos, at 11.48 on January 15, 2007. At that stage the vessel was required to wait at anchorage since the berth was occupied. The port health authority representatives boarded the vessel at the anchorage at 07.30 on January 16 and free pratique was granted at 08.30 on that day. C's case was that laytime commenced at 17.48 on January 15, six hours after the notice of readiness. D took the view that laytime did not commence at Escravos until the vessel was all fast at the berth since free pratique was not obtained within six hours as required by clause 22. C submitted that the obvious commercial purpose of clause 22.5 and 22.6 was to provide that the original notice of readiness was not invalidated where timely clearance within six hours of tender was unobtainable through no fault of the vessel, where timely clearance was not delayed by the fault of the vessel and where the vessel was cleared by, at latest, the time that she berthed. D
submitted that clause 22.5 and 22.6 were of limited application, being only concerned with the position where, at the port in question, the authorities did not grant free pratique at the anchorage but only cleared a vessel once she berthed; that was not the case in Escravos and additionally the vessel was in fact cleared at anchorage.

HELD: Clause 22 of the Additional Clauses supplemented clause 13 of Part II. The general structure of clause 13.1 was to identify when time started to run. The starting point was that that would be six hours after the vessel was in all respects ready to load or discharge and written notice thereof had been tendered by the master to charterers and the vessel was securely moored at the specified berth. Clause 13.1.a2 recognised that the ideal might not be achieved with the result that there could be some delay before the vessel was securely moored at the specified berth. Clause 22 was badly drafted. The general parts of clause 22 were to be distinguished from 22.5 and 22.6. Those sentences were not concerned with the position generally. They were not intended to focus upon the general practice of the port, but on what happened in relation to the vessel in question. They had in mind the special position found in clause 13.1.a2 where the vessel did not proceed immediately to her berth. The reference to "anchorage or other place" was a reference to the location of the vessel during the six hours after giving notice of readiness. The absence of customs clearance and free pratique at that stage would cause no loss of time if customs clearance and free pratique could be obtained on berthing or earlier. C were right to point out that it would be absurd to think that "when she berths" excluded clearance prior to berthing. Securing clearance prior to berthing only assisted in making sure that there would be no loss of time. The consequence was that in such a case clause 22.6 prevented the general position under the earlier part of clause 22 coming into play. The original notice would be valid, subject to what would in any event otherwise be the case that owners could not rely upon a delay caused by the fault of the vessel. On that interpretation clause 22.5 and 22.6 had a clear commercial purpose. The history of events in the instant case plainly brought the vessel within the special provision in clause 22.5 and 22.6. At the expiry of the six hours identified in the second sentence of clause 13.1.a the authorities had not granted free pratique. When she berthed free pratique had been granted. Accordingly the notice of readiness was not invalidated by clause 22.

Judgment for the claimants.
8.3 WHETHER SUBSTITUTED VESSEL TO BE DELIVERED TO THE SAME PLACE AS THE SUBSTITUTED VESSEL WAS WITHDRAWN

In *Gas Natural Aprovisionamientos SDG SA v Methane Services Ltd (The “Khannur”) – [2009] All ER (D) 22 (Oct)* (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2298.html&query=Gas+and+Natural+and+Aprovisionamientos&method=boolean) the respondent held two LNG carrying vessels on long-term time charters, the *Gimi* and the *Khannur*. The appellant fixed a time charter with the respondent for the *Khannur*. A substitution occurred in June 2004 after a dispute arose concerning the drydocking of the *Khannur*. The 2004 dispute was resolved by an agreement dated 2 June 2004 under which the *Gimi* was substituted into the charter. The *Gimi* was due for periodical drydocking in 2007. The applicant assumed that drydocking would take place during May-July 2007, and arranged its deliveries of LNG from suppliers around that. The applicant assumed that the *Gimi* would resume service under the charterparty after drydocking. However, during drydocking, the respondent attempted to substitute the *Khannur* back into the charterparty. The applicant objected to that substitution. Subsequently, the *Khannur* was rejected for loading at Ras Laffan, at which a consignment of LNG was due to be lifted by the applicant from its suppliers. The applicant maintained that not only did they not want the *Khannur* at the time of the purported substitution, but also that she was not ready or suitable for the intended service in any event because she was rejected by the Ras Laffan Port Authority. They also objected that when the respondent purported to place her on hire under the charterparty, she was not in an equivalent position to the position at which the *Gimi* had gone off-hire. Despite the respondent calling upon them to provide orders for the *Khannur*, they declined to do so, contending that she had never been delivered according to the charterparty. The impasse was broken by an agreement which provided for the *Gimi* to return into the applicant's service and for the outstanding disputes to be resolved in arbitration.

The issue in the arbitration was whether the owners had the right to substitute the *Khannur* for the *Gimi*. The appellant claimed hire, which they maintained had been overpaid. The
respondent counter-claimed for unpaid hire, unpaid bunkers and wrongful deductions. The arbitrators found that the Khannur had been validly substituted into the charter. The charterers appealed.

The issue for determination was at what location the substitute vessel had to be made available to the charterers so that obligations to pay for hire and bunkers would begin, if there were an entitlement to substitute, but charterers had not at the time of substitution given orders identifying the next loading port.

The court held:

In the absence of an express term concerning the proper place for substitution of a vessel in a time charterparty, a substitute vessel could be made available to the charterers elsewhere than at the location where the substituted vessel was withdrawn.

A requirement that the substitute vessel be positioned in the place where the substituted vessel was withdrawn could well have led to a pointless waste of time, effort and money. Substitution could only have sensibly take place at a stage when the cargo had been discharged, and by that time charterers ought in the normal course to have given orders identifying the next loading port. If there were to be a risk of an absurd consequence it would arise only by virtue of their own default. On the facts, the Khannur had been validly substituted into the charter.

8.4 ENFORCEMENT OF COVENANT NOT TO SUE IN HIMALAYA CLAUSE NOT CONTRARY TO HAGUE RULES

In the case of Whitesea Shipping and Trading Corporation and Anr v El Paso Rio Clara Ltda and Ors (The “Marielle Bolton”) – QBD (Com Ct)(Flaux J) – 21 October 2009 (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2009/2552.html&query=Whitesea+and+Shipping+and+Trading+and+Corporation&method=boolean) the claimants were the owners and demise charterers of the vessel Marielle Bolton. They sought an anti-suit injunction against the defendant cargo insurers (E) in respect of proceedings commenced by E in Brazil against third parties. W were the owners and demise charterers of a vessel which was entered
in a shipping pool. The vessel was time chartered by the pool to charters (V). V sub-chartered the vessel to sub-charterers (B). The vessel then loaded cargoes in Brazil for carriage to the Dominican Republic and Texas. Bills of lading were issued governed by English law and containing an exclusive English jurisdiction clause and which were subject to the Hague Rules. The vessel grounded off the Dominican Republic. The vessel was refloated and the cargo was discharged in the Dominican Republic or on-carried to the United States undamaged. W declared general average. E commenced proceedings against W in the Dominican Republic and W commenced English proceedings seeking general average and salvage charges and injunctive and declaratory relief on grounds that the proceedings in the Dominican Republic were in breach of the exclusive jurisdiction clauses in the bills of lading. The proceedings both in England and the Dominican Republic were stayed by consent. E then commenced proceedings in Brazil against W, V, B, W's P & I insurers and the vessel's manager. The claims in Brazil, where the Hague Rules did not apply, alleged that all the defendants were strictly liable for breach of their contractual obligations as maritime carriers.

W contended that each of the third parties being sued by E in Brazil was either a servant or agent or sub-contractor within the scope of a covenant not to sue contained in a Himalaya clause in the bills of lading and that the proceedings against them in Brazil were vexatious. E contended that W could not rely on the Himalaya clause, because it was equivalent to conferring on the third parties a blanket immunity from liability contrary to art.III r.8 of the Hague Rules.

HELD: (1) The covenant not to sue in the first part of the Himalaya clause only inured to the benefit of W as carriers under the bills of lading, and not to the benefit also of the various third parties being sued in Brazil, *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) (2001)* 1 All ER (Comm) 455 (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/56.html&query=Homburg+and+Houtimport+and+BV+and+Agrosin+and+Private&method=boolean) followed. (2) The court rejected the submission that whenever the third party under the Himalaya contract performed "carriage functions", the Himalaya contract was a contract of carriage within the meaning of the Hague Rules. *The Starsin* was not an authority for the wide proposition for which E contended, that merely because the third party performed what might be regarded as
"carriage functions", it was to be regarded as a party to a contract of carriage governed by the Hague Rules. (3) The enforcement by the contractual carrier of a covenant not to sue subcontractors, which covenant was only in favour of the contractual carrier, would not be contrary to art. III r.8. The third parties might be said to have performed services incidental to the goods or to the carriage of the goods. However, by no stretch of the imagination could any of them be said to have undertaken the actual carriage of the goods. The actual carriage was undertaken by W alone, pursuant to bills of lading which were owners' bills. That conclusion could not be affected by the fact that, for their own tactical purposes in the Brazilian proceedings, E had alleged that the third parties, in common with W, provided services as maritime carriers of the goods. The court was entitled to look at the substance, as opposed to the way in which E chose to categorise their claim in Brazil. Once it was seen that none of the third parties undertook the sea carriage or was in fact the carrier within the meaning of the Hague Rules the conclusion that the enforcement of the covenant not to sue was not contrary to art. III r.8 was clearly correct. (4) The third parties were servants, agents or sub-contractors of W within the Himalaya clause. W could show a sufficient interest in enforcing the covenant not to sue to entitle them to an anti-suit injunction, *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* (1978) 1 Lloyd's Rep 206 QBD (Comm) followed. It was clear that, unless restrained, E intended to continue against the third parties in Brazil, with a view to seeking at a later stage to persuade the English court to stay the proceedings in England or not continue the anti-suit injunction in respect of claims in Brazil against W on the basis that it was more convenient for the proceedings against all potential defendants to continue in Brazil. W were entitled to an anti-suit injunction restraining E from continuing with the proceedings in Brazil against all the parties being sued in Brazil.

Judgment for the claimants.

Should you have any queries on anything mentioned in this Briefing, please get in touch with Sally-Ann Underhill or your usual contact at Reed Smith.