



Neutral Citation Number: [2019] EWHC 1147 (Comm)

Case No: CL-2018-000112

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 17/05/2019

Before:

THE HONOURABLE MRS JUSTICE MOULDER

Between:

**GA-HYUN CHUNG (AS THE FORMER
STATUTORY TRUSTEE OF HOMER HULBERT
MARITIME CO. LTD.)**
(a dissolved Marshall Islands company)

Claimant

- and -

SILVER DRY BULK CO. LTD.

Defendant

Mr T Young QC (instructed by Holman Fenwick Willan LLP) for the Claimant
Mr T Sprange QC & Ms R Byrne (instructed by King & Spalding LLP) for the Defendant

Hearing dates: 15 and 16 April 2019

APPROVED JUDGMENT

Mrs Justice Moulder :

Introduction

1. This is an application made by the claimant pursuant to section 67 of the Arbitration Act 1996. The claimant in this matter is Mr Chung as the “trustee” of Homer Hulbert Maritime Co. Ltd (“HH”).

Background

2. HH was a corporation incorporated in and under the laws of the Marshall Islands. It is common ground that HH filed articles of dissolution in the Marshall Islands on 28 February 2011.
3. The application relates to an arbitration award made by Mr Klaus Reichert SC, dated 17 January 2018 (the “Award”).
4. The arbitration arose out of the sale of a ship, HN 1045 by HH to the defendant, Silver Dry Bulk Co. Ltd (“SDBC”). The memorandum of agreement dated 1 February 2011 contained a London arbitration clause. The only parties to the memorandum of agreement were SDBC and HH.
5. A notice of arbitration dated 28 October 2014 was filed on 29 October 2014 with the Attorney General of the Marshall Islands. (The claimant’s position is that Mr Chung has no record of having received a copy of the notice of arbitration and the claimant says there is no evidence of it being sent by the Attorney General to HH in Korea).
6. Mr Reichert accepted the appointment as a sole arbitrator on the basis that HH had not responded to the notice of arbitration or appointed its own arbitrator.
7. Subsequently the notice of arbitration was sent by the solicitors for the defendant to Sinokor Merchant Marine Co. Ltd. and Sinokor Maritime Co Ltd. According to the evidence for the claimant (paragraph 10 of the witness statement of Mr Poynder), HH was not a subsidiary of Sinokor Merchant Marine Co. Ltd (“Sinokor”). SDBC say that Sinokor (or another entity in the Sinokor group) incorporated HH for the purpose of selling the vessel to SDBC and was the “owner” of HH (paragraph 22 of the witness statement of Ms Patel). SDBC also say that Mr Chung is, according to the corporate filings, the sole owner and director of Sinokor Maritime Co Ltd and the son of the chief executive officer of Sinokor.
8. Sinokor declined to take part in the arbitration proceedings but (through solicitors and counsel) did attend on occasions before the arbitrator to dispute Mr Reichert’s jurisdiction and in particular whether there was a valid arbitration and whether the tribunal was properly constituted.
9. SDBC alleged that the purchase price paid by HH to SDBC for the vessel included the payment by HH of a US\$5 million secret commission to Hannibal Gaddafi, the fifth son of Colonel Gaddafi and the then controller of General National Maritime Transportation Company (“GNMTC”), the Libyan state maritime company and the parent company of SDBC. The arbitrator found that HH’s payment constituted a bribe and SDBC was entitled to damages.

10. The claimant's case is that no arbitration was ever commenced against HH as HH had been finally dissolved and wound up some eight months before the notice of arbitration purported to commence the purported arbitration, on 28 February 2014. Accordingly, the arbitration was a nullity.

Evidence

11. In support of the application I have witness statements from Mr Poynder, a partner in the firm of Holman Fenwick Willan LLP, dated 13 February 2018 and 19 April 2018. Mr Poynder says that he cannot warrant that he has authority on behalf of HH but has been authorised by Mr Chung to the extent that he has power to do so.
12. For the defendant in opposition to the application, I have a witness statement from Darshna Patel, a solicitor with King & Spalding, dated 12 April 2018.
13. I also had expert reports from Mr Frederick Canavor Jr dated 19 November 2018 and Mr Dean Robb dated 10 December 2018 as to the law of the Marshall Islands. Mr Canavor and Mr Robb produced a joint memorandum dated 25 January 2019. Both Mr Canavor and Mr Robb gave oral evidence to the court and were cross-examined. Mr Canavor is a lawyer but has not practised and does not practice in the Marshall Islands; however he was Attorney General of the Marshall Islands from 2009 to 2011. Mr Robb is a partner in a Hawaii-based law firm; he has advised on matters of Marshall Islands corporate, finance and maritime law over many years.
14. The court had expert evidence as to Delaware law in the form of reports from Ms Elena Norman dated 19 November 2018 and from Mr Myron Steele dated 10 December 2018. Ms Norman and Mr Steele produced a joint memorandum dated 31 January 2019. Ms Norman gave evidence via video link and was cross examined. Due to technical difficulties, Mr Steele was unable to give live evidence. Ms Norman is a partner in a Delaware law firm. Mr Steele is currently a partner in a Delaware law firm but prior to that was a member of the Delaware judiciary for 25 years, in particular holding the office of Chief Justice of the Delaware Supreme Court from 2004 until 2013.
15. Finally, I have a witness statement of Namho Yoon, a Korean lawyer who acts for Sinokor Maritime Co Ltd, dated 30 October 2018 which deals with a meeting with Ms Caroline Chae of the Korean branch of the International Registries affiliated with the Marshall Islands maritime and corporate registries.

Issues for this court

16. The following issues arise for determination:
 - i) whether the challenge brought under section 67 is not a challenge as to "substantive jurisdiction" within the meaning of section 67 of the Arbitration Act 1996 because it is a question of Marshall Islands law and is a question of fact already determined by the arbitrator;
 - ii) whether pursuant to section 105 of the Business Corporations Act of the Marshall Islands ("BCA"), HH existed as a corporate entity on 28 October 2014; in particular whether pursuant to section 105(2) HH continued to exist as a corporate entity in the form of a "trusteeship" of its sole director, Mr Chung for

the purposes of defending any claim brought against the company after the expiry of the three year period in section 105(1);

- iii) whether HH has waived any right to challenge the arbitrator's jurisdiction.

Waiver

17. The third issue in the list of issues can be dealt with shortly. SDBC relied on section 73 of the Arbitration Act 1996 (the "1996 Act") which provides:

"73. Loss of right to object."

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

18. It was submitted for SDBC that the purpose of section 73 was to prevent parties from seeking to delay payment under an award by raising arguments they could and should have raised earlier. It was further submitted that since HH/Mr Chung was validly served with the arbitration proceedings, the affiliate of the primary party, Sinokor, participated heavily in the proceedings and the primary party now seeks to challenge the outcome, this should be regarded as a case falling within section 73 of the Arbitration Act.
19. It was submitted for the claimant that HH did not appear and was not represented before the arbitrator since HH had ceased to exist and thus as no representation could have been made on behalf of HH, no question of waiver could be sustained. The claimant relied on the following dicta in *Baytur SA v Finagro Holdings SA* [1992] 1 QB 610 at 622B:

"I can find nothing in what the plaintiff said or did which could amount to a clear or unequivocal representation on the part of the plaintiffs that they were accepting the board's jurisdiction to determine the issue. On the contrary they made it clear from as early as 7 August that they were accepting no such thing."

The claimant accepted that counsel and solicitors were instructed by Sinokor to appear before the arbitrator but made it clear that they contested jurisdiction.

20. SDBC appears to accept the limited role played by Sinokor before the arbitrator (paragraph 6 of counsel for SDBC's skeleton argument). Although a passing reference was made in submissions to piercing the corporate veil, this was not pursued in this context.
21. In my view on the evidence it is clear that there was no representation by HH that they were accepting the jurisdiction of the arbitrator and although Sinokor did appear, it made it clear that it was contesting jurisdiction. Accordingly, in the circumstances of this case, section 73 does not apply so as to preclude this application by the claimant to the court.

Is the challenge brought under section 67 a jurisdictional challenge within the meaning of section 67 of the Arbitration Act 1996?

22. Section 67 (1) provides:

“(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—”

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).”

23. Section 82(1) includes the following:

“substantive jurisdiction”, in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.

24. Section 30 “Competence of tribunal to rule on its own jurisdiction” provides:

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.”

Submissions

25. It was submitted for SDBC that the 1996 Act represented a sea change in the approach to arbitration in this jurisdiction and in particular the drafters were concerned to answer criticisms as to what was seen as the excessive intervention of English courts in international arbitrations prior to that date. Counsel for SDBC referred to section 1 of the 1996 Act and the decision in *C v D1, D2, D3* [2015] EWHC 2126 (Comm) at [8]. Section 1 of the 1996 Act reads:

“Section 1 General principles.”

The provisions of this Part are founded on the following principles, and shall be construed accordingly-

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

“(c) in matters governed by this Part the court should not intervene except as provided by this Part.” [emphasis added]
Carr J in *C v D1* said:

“[8] The 1996 Act introduced radical changes to English arbitration law, as Lord Mustill and Stewart Boyd QC put it in the preface to *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, giving it “an entirely new face, a new policy and new foundations”. As Lord Steyn commented in *Lesotho Development v Impregilo SpA* [2006] 1 AC 221 (“*Lesotho*”) (at paragraph 18), the ethos of the 1996 Act is to give to the court only those essential powers which it should have, namely to render assistance when arbitrators cannot act in the way of enforcement or procedural steps, or alternatively in the direction of correcting very fundamental errors. Arbitration, as far as possible, and subject to statutory guidelines, should be regarded as a freestanding system, free to settle its own procedure and its own substantive law. A major legislative purpose of the 1996 Act was “to reduce drastically the extent of intervention of courts in the arbitral purpose” (see paragraph 26) and to promote “one-stop adjudication” (see paragraph 34).” [emphasis added]

26. In that case Carr J had to decide whether a challenge to the decision of the tribunal that it had power under the relevant arbitral rules to join a party to the arbitral proceedings

fell within section 67. Carr J concluded that it did not. Carr J held that C's challenge did not involve any challenge falling within s.30(1). She referred at [134] to the decision of Burton J in *CNH Global v PGN Logistics Ltd* [2009] 1 CLC 807 where he said:

“I have no doubt whatever that s.67 relates to situations in which it is alleged that the arbitral tribunal lacks substantive jurisdiction i.e. that there was in fact no arbitration clause at all, and no jurisdiction for the arbitrators to act at all at any rate in relation to the relevant dispute, and not situations in which arbitrators properly appointed were alleged to have exceeded their powers.”

27. Carr J continued at [135]:

“It seems to me that s.30 is likely to contain an exhaustive definition of jurisdictional matters, particularly when s.82 is taken into account. Its wording, namely “that is”, is consistent only with such a conclusion. And, like Eder J, I can see no basis for an expansive approach, particularly given the policy behind the 1996 Act.”

28. It was submitted for SDBC that the only relevant point before the arbitrator and the only relevant point before this court is the question of whether HH continues and continued to exist in the guise of Mr Chung under section 105(2) of the BCA; that this is a question of the status of Homer Hulbert as a matter of Marshall Islands law, which is not a question falling within any of the three prongs of the definition of substantive jurisdiction under section 30 of the 1996 Act.

29. For the claimant it was submitted that the challenge fell within both subparagraph (1) (a) and (b) of section 30.

Discussion

30. The claim in this case (as set out in the claim form) is for a declaration that the notice of arbitration dated 28 October 2014 was incapable of commencing a valid arbitration against HH which did not exist at that time, or that the notice did not commence a valid arbitration.

31. The memorandum of agreement dated 1 February 2011 between HH as Seller and SDBC as buyer provided in clause 16 for the agreement to be governed by English law and any dispute arising out of the agreement to be referred to arbitration in London. Clause 16 (a) stated:

“this Agreement shall be governed by and construed in accordance with English law and any dispute arising out of this Agreement shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force, one arbitrator being appointed by each party. On the receipt by one party of the nomination in writing of the other party’ arbitrator, that party shall appoint their arbitrator within

14 days, failing which the decision of the single arbitrator appointed shall apply. If two arbitrators properly appointed shall not agree they shall appoint an umpire whose decision shall be final.”

32. It is the claimant’s case that no valid notice could be given as HH had ceased to exist. Accordingly, the appointment of the arbitrator was not valid.
33. It was submitted for SDBC that when the arbitrator was dealing with questions as to the status of HH he described his analysis as an analysis as to jurisdiction but that any such characterisation by the arbitrator was obiter and unnecessary to his conclusions.
34. A challenge under sections 67 and 68 of the 1996 Act proceeds by way of re-hearing, not review: *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 (“ Dallah ”) at [25] and [26]; nevertheless, the Court will have regard to the Tribunal's reasoning if helpful (*Dallah* at [31]).
35. At paragraph 7 of the Award the arbitrator stated:

“The outline summary described at paragraph 6 just above encapsulates the key question for the sole arbitrator in determining his jurisdiction; did, prior to the commencement of this arbitration, HH cease to exist in any way. If HH did cease to exist before the commencement of this arbitration then it stands to reason that the arbitration agreement in the Agreement could not be engaged. This is the proposition found in English law in *Baytur v Finagro*”
36. In my view if HH did not exist, clause 16 could no longer operate: HH could not appoint an arbitrator, no notice of arbitration could be sent to it and no arbitrator could be appointed in default of a response, since HH was no longer in a position to appoint its own arbitrator or to respond to the notice. Accordingly, if HH had ceased to exist, Mr Reichert could not be validly appointed and the tribunal was not properly constituted. Thus it seems to me that this question falls squarely within subparagraph (1)(b) of section 30 “whether the tribunal is properly constituted”. The fact that the finding as to the interpretation of Marshall Islands law is itself a finding of fact does not mean that this issue is not within section 67. The tribunal cannot give itself jurisdiction in reliance on a finding of fact as to the status of HH, if in fact there is no jurisdiction.
37. If I were wrong on that, in the alternative, the present challenge, in my view, also falls within subparagraph (1)(a) of section 30 “whether there is a valid arbitration agreement”.
38. It was submitted for SDBC that there is no stand alone or independent challenge grounded in any of the three exhaustive grounds for challenge in section 30 of the Act; that if it were common ground that HH continued to exist at the time when the arbitration was commenced there would be no attack on the validity of the arbitration clause and no attack on the appointment of the Tribunal, and as such to seek to characterise the challenge as a section 67 challenge was wrong.

39. As noted by the arbitrator, the original formation of the arbitration agreement is not in issue, but it is the claimant's case that HH had ceased to exist when the arbitration was commenced. In my view, if HH had ceased to exist, then SDBC no longer had HH as a counterparty to the agreement and thus even though at the outset there was a valid arbitration agreement, there could be no continuing agreement once one of the parties to the agreement ceased to exist. If the arbitration agreement had come to an end, there could no longer be any arbitration commenced pursuant to the agreement. This is clear in my view from the decision in *Baytur S.A. v Finagro Holding S.A.* In that case a dispute was referred to arbitration, each side appointed an arbitrator, and the two arbitrators appointed a third arbitrator. The parties presented their cases in writing over a period of 18 months but prior to publication of the award, the buyers had ceased to exist. Lloyd LJ held that the assignee had not become a party to the arbitration and since the buyer had ceased to exist the arbitration lapsed. Lloyd LJ said:

“What is the consequence? The immediate consequence was, undoubtedly, that the arbitration lapsed. An arbitration requires two or more parties. There cannot be a valid arbitration when one of the two parties has ceased to exist.”

40. I cannot see that this conclusion in *Baytur* that there needs to be two parties in order to have a valid arbitration is in any way affected by the new approach introduced by the 1996 Act and the principle is therefore equally valid following the introduction of the 1996 Act. As such the challenge falls within section (1)(a) of section 30.

Conclusion on scope of section 67

41. Accordingly, for the reasons discussed above, I find that the challenge brought by the claimant is within section 67 of the 1996 Act as being either within section 30 (1)(b) or, in the alternative, section 30(1)(a).

Pursuant to section 105 of the Business Corporations Act of the Marshall Islands (“BCA”), did HH exist as a corporate entity on 28 October 2014?

The decision of the arbitrator

42. The arbitrator concluded that HH existed by reason of the trusteeship of Mr Chung (paragraph 41 of the Award): the arbitrator's reasoning was that interpreting section 105 of the BCA in a uniform manner with the laws of Delaware meant that any trustee appointed pursuant to subsection (2) of section 105 continued in office until the expiration of all possible limitation periods.
43. Counsel for the claimant stressed that this application proceeds by way of rehearing- *Jiangsu Shagang Group Co Ltd v Loki Owning Company Ltd* [2018] EWHC 330 (Comm) at [13] and [14]:

“[13] It is common ground that JSG's challenge under s. 67 of the Act proceeds by way of re-hearing rather than review (see for example *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68), and a party is (in general) entitled to adduce evidence which was not before the Arbitrators. ...

[14] JSG is thus entitled to a full judicial determination on the evidence now, without any preconception that the Arbitrators reached the correct conclusion. This is an " unfettered right " – see *People's Insurance Co of China (Hebei Branch) v Vysanthe Shipping Co Ltd (The Joanna V)* [2003] 2 Lloyd's Rep 617 . In *The Kalisti* [2014] 2 Lloyd's Rep 449 Males J confirmed (at [9]) that the Court is " not confined to a review of the arbitrators' reasoning but effectively starts again...the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) the reasoning will inform and be of interest to the court".

44. Counsel for SDBC appeared to accept that the matter proceeds before this court by way of a rehearing although counsel submitted that the arbitrator's reasoning and his conclusion should be treated as "beyond reproach" and "highly persuasive".
45. Counsel for the claimant pointed out (fairly in my view) that, in reaching his decision, the arbitrator did not have the benefit of the evidence of Mr Steele on Delaware law or of cross examination of Mr Canavor or Ms Norman and in my view, this significantly affects any assistance which the court might otherwise have derived from the arbitrator's reasoning.
46. Counsel for SDBC referred in oral submissions to the factual findings of the arbitrator concerning the circumstances of the payment of the alleged bribe. In response, it was submitted for the claimant that firstly, the issue of the knowledge of SDBC was never tested in the arbitration (by reason of the fact HH was not and could not in the view of the claimant, be represented) and secondly, that the alleged payments were made by SDBC to HH and thence by HH to the order of SDBC with the full knowledge of SDBC. Accordingly, the claimant's position is that the payments were neither corrupt nor bribes.
47. It seems to me that on this application this court is not concerned with, and cannot express a view on, the merits of the substantive allegations which do not have any bearing on the issue of statutory construction before this court.
48. Similarly, in my view the point, which was made on several occasions by counsel for SDBC, that HH filed for dissolution a matter of days after the payment was made, is irrelevant to the issue of statutory construction of section 105 of the BCA.

Relevant statutory provisions

49. Section 105 of the BCA "Winding up affairs of corporation after dissolution" provides:

“(1) Continuation of corporation for winding up.

All corporations, whether they expire by their own limitations or are otherwise dissolved, shall nevertheless be continued for the term of three (3) years from such expiration or dissolution as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property,

to discharge their liabilities, and to distribute to the shareholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit, or proceeding begun by or against the corporation either prior to or within three (3) years after the date of its expiration or dissolution, and not concluded within such period, the corporation shall be continued as a body corporate beyond that period for the purpose of concluding such action, suit or proceeding and until any judgment, order, or decree therein shall be fully executed. [emphasis added]

(2) Trustees.

Upon the dissolution of any corporation, or upon the expiration of the period of its corporate existence, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, real and personal, as may be required by the laws of the country where situated, prosecute and defend all such suits as may be necessary or proper for the purposes aforesaid, distribute the money and other property among the shareholders after paying or adequately providing for payment of its liabilities and obligations, and do all other acts which might be done by the corporation, before dissolution, that may be necessary for the final settlement of the unfinished business of the corporation. [emphasis added]

(3) Supervision by court of liquidation.

At any time within three (3) years after the filing of the articles of dissolution, the High Court of the Republic, in a special proceeding instituted under this subsection, upon the petition of the corporation, or of a creditor, claimant, director, officer, shareholder, subscriber for shares, incorporator or the Attorney-General on behalf of the Government of the Republic, may continue the liquidation of the corporation under the supervision of the court in the Republic and may make all such orders as it may deem proper in all matters in connection with the dissolution or in winding up the affairs of the corporation, including the appointment or removal of a receiver, who may be a director, officer or shareholder of the corporation. [emphasis added]

50. Section 13 of BCA “Construction; adoption of United States corporation law” provides:

“This Act shall be applied and construed to make the laws of the Republic, with respect to the subject matter hereof, uniform with laws of the State of Delaware and other states of the United States of America with substantially similar legislative provisions. Insofar as it does not conflict with any other provision of this Act, the non-statutory law of the State of

Delaware and of those other states of the United States of America with substantially similar legislative provisions is hereby declared to be and is hereby adopted as the law of the Republic, provided however, that this section shall not apply to resident domestic corporations.” [emphasis added]

51. Section 278 of the Delaware Code provides:

“278. Continuation of corporation after dissolution for purposes of suit and winding up affairs:”

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, as bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

52. Section 279 of the Delaware Code provides:

“279. Trustees or receivers for dissolved corporations; appointments; powers; duties ”

When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the directors of the corporation to be trustees, or appoint 1 or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished

business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid. [emphasis added]

Expert evidence

53. The principles concerning the interpretation of foreign statutes are well known. Where foreign law applies, it must be proved as a fact. Proof is obtained through experts familiar with the foreign law. Where there is no authority directly in point, it is for the expert to assist the English court in making a finding as to what the foreign court ruling would be if the issue was to arise for decision there.

Evidence of Mr Canavor

54. The following evidence is derived from Mr Canavor's report:

- i) under section 105, trustees arise by automatic operation of law and have an indefinite term to allow them to dispose of pending litigation (paragraph 20, 34 of his report)
- ii) this is consistent with the BCA's "sister provisions" under the Delaware code-section 105(2) serves the "same purpose" as section 279 of the Delaware code but by a "different method"; the automatic succession of the corporate being and with no requirement of "good cause" or an application to the court (paragraph 21, 34 of his report).
- iii) In *Krafft- Murphy*, the Supreme Court of Delaware explained that a body corporate ceased to exist after the expiry of the three-year period under section 278 but section 278 did not extinguish the corporation's underlying liability to third parties and thus section 279 enables a dissolved corporation (through a receiver) to sue and be sued after the expiry of the three-year period under section 278 (paragraph 30 of his report).
- iv) The statute of limitation for claims is six years, there is no specific limitation period for claims based on fraud. In the case of fraud, statute provides for the cause of action to begin only when the innocent party discovers the cause of action in fraud or has had reasonable opportunity to discover the cause of action. It was not the intention that the BCA would allow dishonest companies to avoid liability by voluntarily winding themselves up. It would be inequitable and impermissible to deny a party a right to bring a claim in fraud. Under Delaware law the courts have referred to their "inherent equitable power to appoint a receiver" even where this remedy is not expressly available by statute (paragraph 36 – 42 of his report).

Mr Robb's evidence

55. The following evidence is derived from Mr Robb's report:

- i) there is no case law in the Marshall Islands on the true construction and effect of section 105 insofar as relevant (paragraph 23 of his report);

- ii) pursuant to section 13 of the BCA, Delaware case law can be used to interpret a statute of the Marshall Islands only if the Marshall Islands statute is “substantially similar” to the Delaware statute and that is not the case here: sections 278 and 279 are not substantially similar to sections 105 (1) and 105 (2) (paragraph 27 of his report);
- iii) there is no exception in the language of section 105 (1) to allow for an exception for a fraud claim; six years is the residual limitation period for all actions not just for fraud actions and the omission of any exception for fraud is deemed under the rules of statutory interpretation to be intentional (paragraph 47 of his report).

Ms Norman’s evidence

56. Ms Norman’s evidence was that under Delaware law section 278 permits the court in its discretion and prior to the expiry of three years from the date of dissolution to continue the corporate existence for an additional period of time in order to complete the winding up of its affairs. Section 278 applies only to actions commenced prior to the corporate dissolution or within the three-year period after dissolution (paragraphs 52 – 54 of her report). It may be possible to bring a suit against a dissolved entity under section 279 which provides for an application to the court to appoint a trustee or receiver and is directed to the restoration of corporate existence (paragraph 59 of her report).

Evidence of Mr Steele

57. In his report Mr Steele stated that:
- i) although the language contained in section 105 (1) of the BCA is “arguably similar” to section 278, the Delaware code contains a number of statutory guidelines governing the post dissolution that are either not analogous to section 105 or are not reflected in section 105 or elsewhere in the BCA (paragraph 19 of his report);
 - ii) while section 279 could be considered “analogous in broad strokes” to section 105, there are significant differences, namely that section 279 explicitly provides that the Court of Chancery may appoint a trustee or receiver for a dissolved corporation “at any time” to wind up the corporation’s affairs under court supervision.

Submissions

58. It was submitted for SDBC that that the exercise under section 13 of BCA is not to try and discover a perfect match in the wording of a statute, but rather to look to analogous statutes that seek to achieve the same purpose and then seek any guidance from it. It was submitted that if one accepts that section 13 is a tool to help interpretation where required, you look at the purpose of the Delaware legislation and then apply the same purpose in interpreting section 105 of the Marshall Islands.
59. It was also submitted for SDBC that, as a matter of Delaware law, in the three years after the dissolution, the company continues to exist as a body corporate and "body corporate" denotes that it has a body and that is the directors. Counsel advanced two

possibilities: firstly, that the directors also have the power of trustees during the three years after dissolution in parallel but do not need to exercise them during the three years; alternatively, that the word "dissolution" means that the directors become trustees at the end of the three years. Counsel submitted that whichever it is, it does not change the outcome: after the three year period expires, section 279 of the Delaware Code empowers the court to oversee and facilitate by appointing a trustee or receiver. It was submitted that the trusteeship permits all acts which might be done by the corporation before it was dissolved that may be necessary for the final settlement of the "unfinished business" of the corporation (as referred to in section 279) and continues until that has been done. So, when the corporation has, in its post-life form, no unfinished business then a trustee can approach the court and seek confirmation to that effect but there is no limit.

60. Counsel for SDBC submitted that the decision in *Krafft* establishes that section 278 does not extinguish the corporation's underlying liability to third parties. To the contrary, section 279 enables a dissolved corporation through a receiver or trustee to sue and be sued after the expiration of the three-year period under section 278.
61. Counsel for SDBC submitted that similarly, under section 105(1) there is a body corporate for a purpose which is defined. When that body corporate ceases to exist and is dissolved, a trustee is in place under section 105(2) with full power to do a range of things including, take care of "unfinished business", as expressly referred to in section 105 (2). So, if it is a very simple company and it has no ongoing activities, section 105(1) is likely to be all that is needed. If the situation is more complex and the company's business and activities are more complex and more long-standing the body corporate may dissolve after three years but that does not extinguish that dissolved corporation's underlying liabilities, which will continue to exist and if required will be dealt with by a trustee under its power to deal with the unfinished business of the corporation.

For the claimant

62. It was submitted for the claimant that the structure of section 105 was clear from the plain language:
 - i) the general rule was that the corporation continued for three years from the articles of dissolution being filed. After the expiry of that three-year period, the general rule was that the corporation ceased to exist.
 - ii) the three-year period is only for certain discrete purposes enabling the company gradually to close its business, discharge its liabilities and distribute assets to shareholders; that is why directors become trustees from the date of dissolution. Subparagraph (2) provides the machinery to give effect to the general impact of section 105.
 - iii) The exceptions to the three-year period are only where legal actions are commenced within the three-year period or where under sub paragraph (3) the High Court orders the continuation of the liquidation under the supervision of the court.

63. Counsel for the claimant accepted that under section 279 the Delaware court has the power to restore the corporate existence of a company. This can be done at any time if “good cause” is shown. However, counsel submitted that no such application has been made in Delaware or the Marshall Islands and so even if this jurisdiction were available, the issue is moot.

Discussion

Approach to interpretation

64. It was submitted for SDBC that you look at the purpose of the Delaware legislation and then apply the same purpose in interpreting section 105 of the Marshall Islands. In *Krafft-Murphy* it was said (page 6 of the report) that whilst at common law dissolution marked a corporation’s “civil death”, the statutory provisions in sections 278 – 282 supplant and supersede the common law “by prolonging a corporation’s existence and its exposure to liability.” Thus, it was submitted that the purpose of the Delaware provisions was to extend the life of the company and to allow for claims to be brought.
65. The approach to interpretation of statutes in the Marshall Islands was set out in the Supreme Court decision in *Lekka v Kabua*. This stated that:
- “The pre-eminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there... Thus statutory interpretation begins with the statutory text... If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial enquiry must cease... Resorting to legislative history as an interpretive device is inappropriate if the statute is clear... When a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions...” [emphasis added]
66. Counsel for SDBC seemed to accept that these principles were relevant, relying in particular on the final sentence cited above of the extract from *Lekka* as part of his closing submissions. In cross examination Mr Canavor seemed reluctant to accept that these were the guiding principles. However, the weight to be given to Mr Canavor’s evidence must be assessed in the light of the following matters:
- i) Mr Canavor was attorney general of the Marshall Islands from October 2009 to October 2011 but he is not currently practising as a lawyer in the Marshall Islands nor had he done so prior to his appointment as Attorney General.
 - ii) During his period as Attorney General Mr Canavor had not had to consider section 105 BCA or the Delaware uniformity principle on the operation and effect of section 105. He accepted that he had not previously considered section 105 until asked to prepare an expert report for the arbitration.

In the light of this it seems to me that his expertise in relation to the issue before the court is in fact extremely limited and the court can derive little or no real assistance from his views.

67. I proceed on the basis that the principles in *Lekka* are both relevant and should be applied. Whilst the provisions of section 13 provide for "uniform interpretation" with the laws of the State of Delaware, in my view the correct starting point is the language of section 105 and the interrelationship of subsections (1) and (2). Mr Canavor was expressly asked in cross examination how section 13 should operate where Delaware and the Marshall Islands depart from a template; should one ignore the changes and apply Delaware law come what may or does one take the approach that the legislature of the Marshall Islands has tried to do something different from Delaware and therefore the statute in the Marshall Islands should be given a potentially different effect. Mr Canavor seemed reluctant to answer the question directly; eventually he said that one would start with the Marshall Islands law if there was a case in point but if there was no case in point Delaware law was incorporated into Marshall Islands law. I do not understand how this answer sits with the approach taken in *Lekka*. As I have already indicated Mr Canavor's evidence appears to be his view without any experience or knowledge to substantiate his view and I do not accept his evidence on this point.
68. It was submitted for SDBC that subparagraph (2) might mean that trustees were appointed from the expiry of three years from dissolution rather than immediately upon filing articles of dissolution. This submission of counsel for SDBC was a construction which had found favour with the arbitrator. However, although the arbitrator had expert evidence in the form of a report from Mr Canavor, Mr Canavor was not cross-examined before the arbitrator. In cross examination the evidence of Mr Canavor on this point was clear and to the contrary:
- “Q. ... You say: upon the filing of articles of dissolution directors become trustees.
- A. Under 105(2), that's correct.
- Q. Now, that means that at the beginning of the process of continuation rather than the end of the process of continuation, the trusteeship has been established?
- A. That would be correct.”
69. This view is consistent with the evidence of Mr Robb (paragraph 21 of his report). On the basis of the expert evidence I therefore reject the submission for SDBC and proceed on the basis that the appointment of the directors as trustees in subsection (2) occurs immediately upon the articles of dissolution being filed and thus is coterminous with the initial 3 year period.
70. Counsel for SDBC submitted that both the function of directors and trustees carried on after dissolution. He relied on section 102(7) of BCA which provides for the revocation of the dissolution of the company by the board of directors resolving to revoke the dissolution. This proposition was not put to the experts and therefore the court has no expert evidence as to how this fits with the scheme of section 105. In any event in cross examination Mr Robb rejected the proposition that there was a distinction between a company existing as a body corporate and a company that does not exist as body corporate but has a trustee with certain powers. Mr Robb said:

“I think if there's a trustee appointed, ... it's not a trustee in the classic law of trust. It's telling the director, you're no longer a director for the purpose of continuing the business. You are now to act as a trustee to wind up and settle the affairs of this corporation, and indeed as a trustee you have a fiduciary obligation to the shareholders and creditors, which the director normally would not have. So I think it's just saying, hey, director, you know, things have changed. You've dissolved. You got three years to wrap this up, act as a trustee in doing so.”

71. Mr Canavor's evidence was that section 105(2) creates an indefinite existence for the company subject only to limitation. His evidence as to the nature of the continuing entity was unclear: he appeared to say that the company continued through the trustees and not as a corporate body, but when asked to explain what happened to litigation that was started prior to the expiry of the three year period against the corporate body, he could not explain how that liability then transferred to the trustees.
72. Mr Canavor's evidence in cross-examination appeared to be that the company ceased to exist as a corporate body but continued in some form through the trustees for so long as any claims might be brought against the company. He was asked:

“... assuming that the criterion of corporate existence is the availability somewhere in the world of an arguable cause of action -- cause of action which won't be struck out -- then no Marshall Islands company will ever cease to exist upon the expiry of three years from filing of articles of dissolution?”
73. Mr Canavor responded:

“I would agree with that.”
74. In cross-examination Mr Robb was asked whether it would “make sense” that the directors continue on as trustee post the three-year period, exercising the full powers they have under section 105 (2). Mr Robb responded that, where there is a need to continue the liquidation of the company one should apply to the court under section 105(3). He observed that the automatic continuation of a statutory trustee would mean that a company in the Marshall Islands could never die but would continue potentially forever and he expressed the view that this would be unique among USA common law jurisdictions and that he did not think that would be anything that the court and the Marshall Islands would agree to.
75. Counsel for SDBC submitted that the reference to "unfinished business" in section 105(2) would extend to any potential claim in the future. Counsel submitted that for practical purposes straightforward companies would be wound up within the three-year period.
76. It seems to me that the interpretation advanced by counsel for SDBC for subsection (2) would mean that in effect the company would always continue in existence beyond the three years in sub paragraph (1) albeit through the mechanism of the trustees. This would have the result that there would appear to be no purpose to the three year limitation in subparagraph (1).

77. Further there was no evidence to support the submission for SDBC that the otherwise indefinite trusteeship could be brought to an end by an application to the court. Even if such an application could be brought, it is unclear how this would operate given that companies would not know if there were latent claims e.g. environmental or hidden property defects, which according to Mr Canavor would mean that the company continued in existence.
78. The proposition of an automatic and indefinite trusteeship is very different from the position in Delaware where the company will come to an end after three years but there is express provision for a company to be resuscitated if "good cause" is shown to the court.
79. Counsel for SDBC also relied on the Nevada case of *Canarelli* but in my view, that did not establish that (as a matter of Nevada law) the trusteeship continued indefinitely (or could be ended by an application to the court). It is clear from the judgment that under Nevada law:

“winding up is complete upon the final disposition of assets to the shareholders and the payment of debt to creditors... While the corporation continues as a legal entity for the purpose of post dissolution claims,... a director trustee’s statutory power to act on behalf the dissolved corporation terminates once the wind-up process is complete”

There was express provision under Nevada law for an application to be made to the court following the dissolution of the corporation to continue the director trustees but the court held that the relevant statute did not confer authority on the court to appoint an unwilling director trustee of the dissolved corporation, whose winding up process had been completed, to serve as director trustee of the dissolved corporation.

80. Further on SDBC’s interpretation, the continuation of the company’s existence through the trustees for the purpose of litigation would extend even after the distribution of assets to shareholders pending these unknown claims being brought. It is unclear how any such claims would therefore be satisfied.
81. Accepting the evidence of the experts that the appointment of the trustees takes effect immediately on the filing of the dissolution, it seems to me that the natural meaning of the language in subparagraphs (1) and (2) is that under subparagraph (1) the company exists for a further three years to allow the company to be wound up. In order to effect the orderly wind down of the company the directors are constituted as trustees with "powers" to carry out the purpose stated in subparagraph (1).
82. It seems to me contrary to the natural language of "powers" to interpret subsection (2) as giving rise to continuing obligations on the part of the company, independently of subsection (1) albeit through the trustees, in order to preserve any liabilities for future litigation. In my view subsection (2) confers the powers upon the directors to carry out the functions required pursuant to subsection (1). In my view the fact that the trustees are expressly given power under subsection (2) to do all other acts that may be necessary for the “final settlement of the unfinished business” does not independently extend the life of the corporation which under subsection (1) is expressly continued for a term of three years (subject to the express extension for litigation commenced within

the three-year period). Subsection (1) expressly refers to “enabling them gradually to settle and close their business” and distributing to shareholders any remaining assets. It is therefore in my view inconsistent with these purposes in subsection (1) to interpret subsection (2) as continuing the life of the corporation beyond the point at which the assets have been distributed to shareholders.

83. Assuming that a Marshall Island court would have regard to Delaware law as analogous in the circumstances, I note that Ms Norman accepted that under Delaware law the effect of section 278 was that company ceased to exist after 3 years and was only resuscitated if court so ordered.
84. Further I do not see that the conclusion which I have reached on the language is in any way inconsistent with the decision in *Krafft*. In *Krafft* it was held that section 278 prolonged the existence of the body corporate for three years and thereafter section 279 empowered the court to facilitate the completion of unfinished business by appointing a trustee or receiver. Further the court held that section 278 did not operate as a statute of limitations that would extinguish a dissolved corporation’s liability to third parties and thus section 279 enabled a dissolved corporation through a receiver to pursue and be sued after the expiration of the three-year period under section 278. In my view section 279 is dependent on an application being made to the court and there is no such equivalent right under section 105 (unless made within the three year period).
85. It was submitted by counsel for SDBC (supported by the evidence of Mr Canavor) that there was no such right because the courts in the Marshall Islands would not have the resources to deal with applications and therefore this explained why the provision for trustees under sub paragraph (2) was automatic. I have already expressed my approach to the evidence of Mr Canavor and even if it is correct that the Marshall Islands has limited resources, it does not constitute a basis to override the clear language of section 105. Further it should be noted that there is a right to apply to the court under subsection (3) which would suggest that the court does regard itself as having sufficient resources to deal with applications in certain circumstances.
86. Finally, on interpretation it seems to me that it is significant that under section 105 (3) the right to apply to the court is within the three-year period only. Counsel for SDBC submitted that this was a provision to enable the court to deal with complicated or difficult liquidations. It is unclear however why if such a supervision is required in these cases, it does not extend to companies once they are continued in the form of the trusteeship. There was no expert evidence which would explain this.

Fraud exception

87. In my view there is no basis to interpret section 105 as allowing a party to bring a claim in fraud notwithstanding the expiry of the three year period. Section 105(1) expressly deals with litigation commenced after the date of dissolution but imposes a three year time limit. There is no distinction or exception made for fraud claims.
88. Even if there is an inherent equitable power (as Mr Canavor contends), no application had been made to the courts of the Marshall Islands for the courts to exercise such inherent power prior to the commencement of the arbitration. To the extent that it was submitted in closing for SDBC that the inherent jurisdiction would arise without an application to the court, that seems to me to give rise to an impossible uncertainty as to

whether or not the company remained in existence and in any event is contrary both to the provisions of the Delaware case law (as described at paragraph 41 of by Mr Canavor's report) and paragraph 42 of his report applying such Delaware principles to the Marshall Islands law, both of which contemplate the appointment of a receiver by the court, in exercise of its powers, rather than a continuation of the corporation without any action on the part of the court.

Evidence of change in last known address

89. A further point was mentioned in submissions concerning an apparent change in the address of HH after the expiry of the three-year period from the date of dissolution. Counsel for SDBC referred to the evidence of Mr Strauss, a lawyer in the Marshall Islands, instructed on behalf of SDBC to serve the notice of arbitration and subsequently other arbitral documents on HH. In emails sent by the trust company designated to administer Marshall Islands entities, Mr Strauss was advised that there had been a change of HH's "last known address" after the alleged final date of dissolution in 2014.
90. The evidence of Mr Yoon (paragraph 16 of his witness statement) is that at a meeting with a Ms Chae from the trust company, she told him that the employee concerned seemed to have made a "clerical mistake" in relation to HH's billing agent address in a situation where she did not "understand the background".
91. Counsel for SDBC submitted that it "certainly seems to suggest that our interpretation and view on section 105(2) is right because we have a company that on their case was dissolved and had no life, no pulse, and could never be resurrected still exhibiting something of a pulse". The submission that the company was still in existence is in my view rebutted by the evidence of Mr Yoon. Further, in my view such evidence is not relevant to the issue of statutory construction and it does not affect my conclusion on the meaning of section 105.

Conclusion on section 105

92. For the reasons discussed above, I find that the interpretation of section 105 of BCA is that the company exists for three years after the filing of the articles of dissolution and the period is not extended by subsection (2). If claims are brought within the three-year period then the period of the company's life will be extended under subsection (1). However, the life of the company is not indefinite by virtue of the trusteeship under subsection (2) and subsection (2) does not extend the life of the company in order to dispose of potential claims in the future.
93. The provisions of section 279 cannot override the language of section 105 merely because they are dealing with the same situation, i.e. the position of the company following dissolution and in that sense "sister provisions". Delaware law has adopted a different approach namely that the life of a company can be revived after the three year period through an application to the court and the appointment of the directors as trustees. The dissimilarities between section 105 and sections 278 – 279 are significant enough to conclude that it is not possible to construe section 105 in a manner which is "uniform" with section 278-279 of Delaware law.

94. Accordingly, for all these reasons, I find that pursuant to section 105 of the BCA, HH had ceased to exist by October 2014.