



Neutral Citation Number: [2021] EWHC 1707 (Comm)

Case No: CL-2020-000498

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28/06/2021

**Before :**

**PATRICIA ROBERTSON QC**  
**SITTING AS A DEPUTY JUDGE OF THE HIGH COURT**

-----  
**Between :**

**EASTERN PACIFIC CHARTERING INC**  
**- and -**  
**POLA MARITIME LTD**

**Claimant**

**Defendant**

-----  
**David Semark** (instructed by **Wikborg Rein LLP**) for the **Claimant**  
**Thomas Steward** (instructed by **MFB Solicitors**) for the **Defendant**

Hearing date: 14 June 2021  
-----

## **Approved Judgment**

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

.....  
**PATRICIA ROBERTSON QC**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 28 June 2021 at 10:30 am**

## **PATRICIA ROBERTSON QC :**

### Introduction:

1. This is the Claimant's application to dismiss and strike out that part of the Defendant's Counterclaim which seeks to advance claims in tort based on the alleged wrongful arrest of the "POLA DEVORA" in Gibraltar in July 2020. The application is brought under CPR R11.1 and R3.4(2). In essence the claimant submits that this court has no jurisdiction to try the Defendant's tort claims and should decline jurisdiction in favour of the Supreme Court of Gibraltar. I am not today concerned with determining such other issues as may in due course arise as regards the merits of the proposed tort claims.

### Factual background:

2. The Claimant, as owners, and Defendant, as time charterers, entered into a time charterparty for the "DIVINEGATE", dated 18 September 2019 ("the Charterparty").
3. The Charterparty contains an exclusive jurisdiction clause which provides as follows:

*"Clause 93 Dispute Resolution Clause*

*This Charter Party shall be governed by English law and any dispute arising out of or in connection with this Charter shall be submitted to the exclusive jurisdiction of the high court of justice in England and Wales...."*

4. The Defendant took delivery of the vessel on 21 September 2019 and redelivered it on 3 November 2019. Following redelivery of the vessel, a dispute emerged as to whether the Defendant was liable for the balance of the hire, since the Defendant asserted the right to set off various costs and expenses it claimed to have incurred during the course of the charter.
5. In order to secure its claims, the Claimant arrested a different vessel, the "POLA DEVORA", in Gibraltar on 2 July 2020, by a claim form lodged on that date in the Supreme Court of Gibraltar. The Claimant's position is that it did so on the basis of a *Lloyd's List* Intelligence report which described the Defendant as the beneficial owner of the "POLA DEVORA". The Defendant's position is that it was merely the time charterer of the "POLA DEVORA", the owner being Pola Rise OOO. The Claimant released the vessel on 6 July 2020 following provision of a copy of a time charter between the Defendant and Pola Rise OOO for the vessel but does not concede that the Defendant is not the beneficial owner or that the arrest was wrongful.
6. The witness statement in support of the application stated that the Claimant intended to apply for a stay of the Gibraltar proceedings under section 19 of the Civil Jurisdiction and Judgment Act 1993<sup>1</sup>, and further to apply that the vessel remain detained, or that

---

<sup>1</sup> The relevant section provides as follows: "*Security in Admiralty proceedings in Gibraltar.*  
19. (1) Where in Gibraltar a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of an overseas country, the court may, if in those proceedings [i.e. the proceedings in Gibraltar] property has been arrested or bail or other security has been given to prevent or obtain release from arrest—  
(a) order that the property arrested be retained as security for the satisfaction of any award or judgment which

adequate security be provided, pending resolution of the dispute under the Charterparty, which would be resolved in London in accordance with the relevant dispute resolution and jurisdiction clauses contained in the Charterparty.

7. That reference to section 19, and the explanation given as to the Claimant's intention, made clear that the purpose of the arrest was to serve as security for claims under the Charterparty that were to be brought in London, consistently with the exclusive jurisdiction clause. That accords with Article 24 of the 1968 Convention, which permits a party to apply for provisional or protective measures in one contracting state even where another contracting state has jurisdiction over the substance of the matter.
8. The Defendant entered an acknowledgement of service in the Gibraltar proceedings on 31 July 2020. The Defendant ticked both the box stating "*I intend to defend all of this claim*" and the box stating "*I intend to contest jurisdiction*". The Claimant relies on that as establishing the jurisdiction of the Gibraltar Court in respect of the tort claims now sought to be brought here.
9. On 4 August 2020, the Claimant brought proceedings in this Court for the balance of hire (US\$99,982.79) said to be due from the Defendant under the Charterparty.
10. There was then a hiatus whilst attempts were made at settling the dispute. The proceedings in both jurisdictions were stayed with express reference to that purpose. However, the order made in Gibraltar was expressed to stay the proceedings there until further order, whereas that made in these proceedings was expressed such that the stay automatically lifted if no settlement had been achieved by 11 September 2020, as transpired to be the case.
11. On 16 October 2020, although the Gibraltar proceedings remained stayed, Pola Rise OOO entered an acknowledgement of service in those proceedings stating an intention to defend.
12. On 10 November 2020 the Defendant served a Defence and Counterclaim in the proceedings in this jurisdiction. This advanced a number of counterclaims relating to costs incurred during the charter and alleged under-performance of the vessel, which it is common ground come within the scope of the exclusive jurisdiction clause and will, along with the Claimant's claim for the balance of hire, be litigated here. Those counterclaims total \$139,377.44 or alternatively \$97,474.76. However, the Defendant also counterclaims for damages in the sum of \$54,400 in respect of losses alleged to have been suffered as a result of the alleged wrongful arrest of the "POLA DEVORA" in Gibraltar. Whilst of course I do not diminish the significance of this litigation for the parties, it will be immediately apparent from those figures that these sums (particularly

---

*(i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and*

*(ii) is enforceable in Gibraltar; or*

*(b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.*

*(2) Where a court makes an order under sub-section (1), it may attach such conditions to the order as it thinks fit, in particular, conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings.*

*(3) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order made by a court under sub-section (1) as would apply if it were held for the purposes of proceedings in that court."*

if the conclusion at the end of the day is that they fall to be netted off) are relatively modest by comparison with the likely costs of litigation in this Court, never mind litigation in two different jurisdictions.

13. The counterclaim for damages in respect of the arrest is advanced on a number of alternative bases, all of them under English law: breach of the Torts (Interference with Goods) Act 1977, tortious interference with use of the “POLA DEVORA”, conversion of the “POLA DEVORA” and a tortious inducement of a breach of contract (i.e. the time charter of the “POLA DEVORA”).
14. At first blush that is difficult to reconcile with Article 6 of the 1952 International Convention Relating to the Arrest of Sea-Going Ships (“the Arrest Convention”) which provides that:

*“All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.”*

15. Furthermore, the Claimant contends that *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 established that it is necessary to prove malice or gross negligence in order to recover damages for wrongful arrest. I do not read the Counterclaim as making any such allegation, as presently drafted.
16. These, however, will all be matters to be litigated out in whatever is determined to be the appropriate jurisdiction, since the application before me is advanced solely on the basis of jurisdiction and not on the basis that these counterclaims disclose no reasonable grounds for a claim.
17. The Claimant sought an extension of time for service of its Reply and Defence to Counterclaim. The first indication that the Claimant intended to challenge the jurisdiction as regards the tort claims came by way of the Reply and Defence to Counterclaim, which was served 35 days after the Defence and Counterclaim. The Defendant contends that, by not contesting the jurisdiction within the timeframe of 28 days (CPR 11.1(4) as amended by CPR 58.7(2)) and by meantime seeking an extension of time, the Claimant submitted to the jurisdiction in respect of the tort claims.

The expert evidence:

18. Both parties sought to rely on expert evidence from Gibraltar lawyers. Neither had sought permission to do so. There had therefore been no case management directed to ensuring the evidence was appropriately focussed and limited to matters relevant to jurisdiction (and it was not). Moreover, whilst the Defendant lodged an application on 2 June 2021 indicating that it wished either to be able to cross-examine or for the Claimant’s evidence to be excluded, the practical reality (as Mr Steward sensibly accepted) was that this was a moot point by the time we came to the hearing, since it was all too late.
19. It seems to me that, just as in *BB Energy (Gulf) DMCC v Al Amoudi and others* [2018] EWHC 2595 (Comm) at [49], it is fair to express this as an “*even-handed criticism of*

*both sides*”, regardless of who fired the first salvo in the exchange of expert evidence. In general, CPR Part 35 applies where a party seeks to adduce expert evidence on an interlocutory application, at least unless the Court is merely being asked to take into account the existence of issues which the Court is not being asked to decide at that stage: *New Media Distribution Company Sezc Limited v Kagalovsky* [2018] EWHC 2742 (Ch); *Ross v Atlanta* [2021] EWHC 503 (Comm) at [7].

20. Had I considered that the outcome of the Claimant’s application depended on the expert evidence, this omission to grapple sooner with appropriate directions in respect of the expert evidence might have been problematic. However, that evidence seems to me to be of very limited relevance to jurisdiction – and certainly nothing significant turns on points on which the experts disagree.

The issues for determination:

21. It is common ground between the parties that matters of jurisdiction as between this Court and the Supreme Court of Gibraltar are governed by the Brussels Convention 1968 and that this remains the case notwithstanding Brexit. That results from the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997 (SI 1997/2602), which applies Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 (i.e. the 1968 Brussels Convention) as if England and Gibraltar had been separate contracting states to the 1968 Convention.
22. This is therefore one of the rare cases in which the Court still has to look to the 1968 Convention, rather than any of its successors.
23. The Defendant is domiciled in Cyprus, a contracting state, whereas the Claimant’s domicile is not in a contracting state. That has an impact on which Articles of the Convention apply.
24. The first question is whether the tort claims fall within the scope of the exclusive jurisdiction clause in the Charterparty in favour of this Court, on the footing that whether or not they are claims “*arising out of*” the Charterparty, they are at least claims “*in connection with*” the Charterparty. If so, then Article 17 of the 1968 Convention would apply and this Court has jurisdiction over the tort claims.
25. If they do not come within the scope of Clause 93, then it becomes necessary to consider whether this Court can and should assume jurisdiction on some other basis.
26. If this Court does not have jurisdiction in respect of the tort claims, that is an end of the matter, but if this Court does have jurisdiction it is then necessary to consider whether the Court is nevertheless obliged to, or should, decline jurisdiction in favour of the Supreme Court of Gibraltar. That involves determining:
  - a. Whether there are “*proceedings involving the same cause of action and between the same parties*” here and in Gibraltar, such that this Court is obliged to decline jurisdiction in favour of the Supreme Court of Gibraltar as the Court first seised, pursuant to Article 21.
  - b. If not, whether these are related actions within the meaning of Article 22 and if so whether, as the Court second seised, this Court should as a matter of

discretion decline jurisdiction over the tort claims (and more broadly, the issue of *forum non conveniens*).

The legal framework governing jurisdiction:

27. The following provisions of the 1968 Convention are relevant:

- a. *“ARTICLE 4: If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State...”* Article 4 applies to the Claimant, which is not domiciled in a Contracting State, in its capacity as Defendant to the Counterclaim. It is common ground that Article 16, which confers exclusive jurisdiction, regardless of domicile, in respect of certain types of claim, is not engaged.
- b. *“ARTICLE 17: If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction...”* That applies, since the Defendant is domiciled in a contracting state, namely Cyprus.
- c. *“ARTICLE 18: Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.”* There are issues between the parties, which I address below, as to whether Article 18 is engaged. As noted above, Article 16 does not apply.
- d. *“ARTICLE 21: Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court.*

*A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.”* The Claimant submitted that the tort claims sought to be raised in these proceedings are the same claims as those of which the Supreme Court of Gibraltar is seised.

- e. *“ARTICLE 22: Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.*

*A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.*

*For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate*

*proceedings.*” The Claimant’s fallback position was that the two sets of proceedings are related claims and this Court should exercise its discretion in favour of the tort claims being resolved in Gibraltar.

- f. “*ARTICLE 24: Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.*” As I will come to, this permits a limited derogation from Article 17.
28. It is worth noting that Article 5(3), which confers jurisdiction in matters relating to tort, delict or quasi-delict, in the courts for “*the place where the harmful event occurred*”, does not apply in this case because the tort claims relating to the alleged wrongful arrest are brought against a party, the Claimant, who is not domiciled in a Contracting State.
29. The following provisions of the Arrest Convention are also relevant here:
- a. Article 4 provides that: “*A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the Contracting State in which the arrest is made.*” That confers exclusive jurisdiction on the Supreme Court of Gibraltar as regards giving authority to arrest a ship for a maritime claim.
  - b. Article 6, as noted above, makes provision, inter alia, as to which law is to govern liability in damages for wrongful arrest, namely the law of the jurisdiction where the arrest was made, but does not specify that only the Court with jurisdiction to make the arrest in the first place should determine any claim for consequential damages. That is plainly not the case, as is illustrated for example by *The Damianos* [1971] 1 Lloyd’s Rep. 502, discussed below.
  - c. Article 7:
    - i. This gives the Courts where the arrest was made jurisdiction to determine “*the case*” upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in a number of specified cases (none of which are applicable here). Where the arresting Court does not have jurisdiction over the merits, the “*bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide*”.
    - ii. That latter provision is consistent with the policy behind Article 24 of the 1968 Convention, in allowing protective measures in jurisdictions that do not have jurisdiction over the substantive claim.
    - iii. Here, the arrest was sought expressly on the footing that the merits of the owner’s claims were a matter for the English Court, by virtue of Article 17, and the arrest was being applied for solely by way of security.

30. The Arrest Convention does not itself make provision in respect of *lis alibi pendens* but falls to be read together with the 1968 Convention in that respect: *The Tatra* [1999] QB 515 (1994).
31. The effect of these provisions is that the obtaining of security, by way of an arrest, can (by virtue of Article 4 of the Arrest Convention) only be done by applying to the Court where the ship sought to be arrested is located (in this case, Gibraltar). However, it does not follow that that Court also has exclusive jurisdiction as regards whether the Claimant is liable in tort as a consequence of having taken that step in Gibraltar (albeit establishing the wrongfulness of the arrest as a matter of Gibraltar law is a necessary component in any such cause of action). The Arrest Convention leaves that question open.
32. The Defendant's primary case is that, on the facts of this case, Article 17 applies to confer jurisdiction on this Court, because the exclusive jurisdiction clause is broad enough to cover the tort claims. The Defendant's fallback position is that, if that is wrong, the Court nevertheless has jurisdiction in respect of its counterclaims, either because that necessarily follows from the Claimant's decision to litigate its own claims here, or because the Claimant has taken steps since service of the Defence and Counterclaim which waived any right to object to jurisdiction in respect of the counterclaims.

The scope of the exclusive jurisdiction clause:

33. The Defendant relied on *Coventry Waste Ltd v. Russell* [1999] 1 WLR 2093 (at 2103) for the proposition that I should interpret the phrase "*in connection with*" as "*having something to do with*". However, as Lord Hope observed in that case, it is a "*protean*" phrase and therefore I do not gain much assistance from how it has been interpreted in that very different legal context of a statutory scheme for calculating rateable values (and in any event the actual decision in that case was that that was not an adequate meaning to give those words in that context, even if it might be the right interpretation in some other contexts).
34. I was not referred to any case that had considered the phrase in the context with which we are concerned. I therefore approach the question on the footing I must simply apply the principles of construction articulated in *Fiona Trust v. Privalov* [2008] 1 Lloyd's Rep. 254.
35. The House of Lords in *Fiona Trust* laid down the principles to be applied in construing exclusive jurisdiction clauses. The Court should (per Lord Hoffmann at [13]) "*start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*". In that case, the issue was whether a claim that the charter was invalid (on the basis that it had been procured by bribery) was a dispute "*arising under this charter*", within the meaning of the clause referring disputes to arbitration. It was held that it was.
36. Whereas some of the previous cases had drawn fine distinctions according to whether a clause used the words "*arising under*" or "*arising out of*", Lord Hoffman declared there to be a need for a "*fresh start*" (at [12]) and Lord Hope deprecated such "*fussy distinctions*" (at [27]), thereby consigning those distinctions to the legal dustbin. That



said, had the clause in question instead been worded so as to refer any claims “*in connection with*” the charter, it seems that would have been recognised, even before *Fiona Trust* was decided (and all the more so in light of that decision), as referring to a wider class of claims than just those regarding the rights and obligations under the contract itself (see at [11]).

37. The language “*in connection with*” is naturally to be read as, if anything, wider than “*arising under*”, or variants on that phrase. Taking a broad and common sense approach to construing the clause, as I am enjoined in *Fiona Trust* to do, a tort claim may be said to arise “*in connection with*” the charter not only where there are parallel claims in tort and contract (as, for example, for breach of a duty of care) but also where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom.
38. The connection here lies in the fact that steps taken by the Claimant specifically in order to secure itsr claims under this charter are alleged to have been tortious and to have caused the Defendant loss. The Claimant took those steps in express reliance on its rights under the charter and, but for the relationship created by the charter, no arrest would have taken place. The alleged flaw in the arrest is that the vessel arrested could not properly be made the subject to an *in rem* claim because it was not beneficially owned by the party who is liable to the Claimant *in personam* under the charter.
39. It was in general terms foreseeable by the parties that, in the event of a dispute arising, steps might be taken in other jurisdictions to enforce their respective rights and obligations under the charter, and it would be consistent with a “*one-stop*” approach to all disputes arising from the relationship created by the Charter (*Fiona Trust* at [27]) for any damages claims arising from such steps to enforce those rights to be dealt with alongside the substantive dispute, in this Court. That allows a single accounting, as regards the overall financial position of the parties as a result of the legal relationship created between them by the charter, and their dispute about what rights and obligations properly flow from that legal relationship.
40. That seems to me to be the view which could plausibly be attributed to rational businessmen, viewing the matter prospectively at the time of contracting. It is not a matter of construing the clause by reference to subsequent events: c.f. *BNP Paribas v Trattamento Rifiuti* [2019] 2 Lloyd’s Rep 1 at [61]. None of the authorities relied on by the Claimant dictates a different answer.
41. In this respect, this case is distinguishable from *Ryanair Ltd v Esso Italiana Srl* [2015] 1 All ER (Comm) 152. That case was concerned with a jurisdiction clause which referred disputes “*under this Agreement*” to the English Court (in itself, a narrower form of clause). The agreement was for the supply of fuel. The issue was whether the jurisdiction clause covered a claim for breach of statutory duty on the basis that the supplier had participated in a price-fixing cartel. At first instance the Court had interpreted a particular clause in the contract as giving rise to an overlapping contractual claim and on that basis found the claims to be “*closely knitted together on the facts*” (applying *The Playa Larga* [1983] 2 Lloyd’s Rep. 171). However, that argument was rejected by Rix LJ in the Court of Appeal, who disagreed with that interpretation of the contract and found there was no contractual claim available. The claim for breach of statutory duty lay against all participants in the cartel and the fact that, out of all of the possible defendants, the Claimant had chosen to sue the counterparty to the supply

contract did not create a connection with the sales contract, so as to bring the statutory duty claim within the scope of the contractual jurisdiction clause (see at 165-166).

42. That was therefore a case where the statutory duty claim arose wholly independently of the existence of the contract and, moreover, where the jurisdiction clause was in narrower terms. In contrast, on the present facts, there is a clear causal connection, which seems to be sufficient for the purposes of a clause worded “*in connection with*”.
43. Likewise, this case is distinguishable from *The Paola d’Alesio* [1994] 2 Lloyd’s Rep. 366. There the issue was whether claims that the settlement of a dispute under the charterparty had been procured by duress (in the form, *inter alia*, of a wrongful and malicious arrest) came within the scope of a clause referring to arbitration disputes “*arising under*” the bill of lading. Again, “*in connection with*” seems naturally broader in scope. Furthermore, the reasoning at 371-2 of Mr Justice Rix’s judgment appears both to be *obiter* (since, as appears from the passage at the foot of the left hand column on 371, he had accepted that the arbitrator lacked jurisdiction irrespective of whether or not the tort claims in question came within the scope of the relevant clause) and may now be questionable in light of *Fiona Trust*, since it seems to be exactly the sort of fine distinction there deprecated.
44. I acknowledge that the tort claims here are not overlapping or factually interlinked with the contract in the same manner as was the case in *The Playa Larga* (where a claim in conversion was factually bound up with a contractual claim for breach of a warranty of quiet possession of the goods). However, I do not think that case (decided as it was before *Fiona Trust* mandated a “*fresh start*” and on the basis of a different jurisdiction clause) can be taken to be laying down as a universal requirement that there must always be an overlap with the factual issues in the contractual claim, or that it prevents me from taking the common sense view I have outlined above as to the nature of the connection that suffices for the purposes of the particular clause that is before me.
45. The same can be said of *The Angelic Grace* [1995] 1 Lloyd’s Rep 87, where again the contractual claims and tortious claims arose out of the same incident (a collision between ships during the course of the charter whilst in Italian waters) and that factual overlap justified treating the tort claims as “*arising out of*” the contract, such that the London arbitrators had jurisdiction and Italian proceedings in relation to the collision were restrained, though that would otherwise have been the natural forum.
46. Whilst both of those cases involved a connection based on overlapping facts, which were common to the contractual and tortious claims, it does not follow from them that nothing less than that will suffice when one is considering whether a claim for damages for wrongful arrest that arises solely in tort can be said to arise “*in connection with*” the charter.
47. The present case seems to me closest to *The Damianos* [1971] 1 Lloyd’s Rep. 502, where the Court of Appeal held that a claim for damages for wrongful arrest fell within the scope of an arbitrator’s jurisdiction. Lord Denning there took a robust approach to a clause conferring jurisdiction on London arbitrators of “*any dispute arising during execution of this Charterparty*”, treating it as covering claims in respect of two arrests, one of which had post-dated the charter by some months.

48. The owners of *The Damianos* having stopped discharge of the cargo, the charterers had arrested the ship (in Amsterdam) and then, some months after the end of the charter, they had arrested the ship again (in Rotterdam). The owners claimed damages in the arbitration, inter alia on the basis that the arrests had been wrongful. The charterers contended that the arrests fell outside the scope of the arbitration clause on the footing that the tort claims were entirely separate from the contract. Lord Denning rejected that saying (at 504, middle of right hand column):

*“The arrest of the ship was the direct consequence of the charterers’ claim for damages against the shipowners. The charterers arrested the ship so as to enforce their claim. Their claim – that the shipowners had wrongfully stopped discharging the oil – was certainly a claim which arose out of the contract during the execution of it. It was plainly within the arbitration clause. It had necessarily to be decided by the arbitrator. The arrest was simply the follow up to that claim. It was so closely connected with it that the rightness or wrongness of the arrest is also within the scope of the arbitration”.*

That part of the judgment is equally applicable to the facts before me.

49. Lord Denning then went on to refer (504, foot of right hand column) to the fact that the charterers’ claim had been held to be “*bad*” and that therefore the lawfulness or otherwise of the arrests was “*so much part and parcel of the inquiry that they come within the broad scope of the arbitration clause*”. Sir Gordon Willmer likewise noted (at 505) that the arbitrator could not decide whether the arrest was wrongful without considering the terms of the charterparty as a whole. The Claimant relies on those passages as showing that what was essential to the decision was that this was a case where the substantive contractual claim in respect of which security had been sought by way of an arrest was alleged to be spurious and hence the issue of the wrongfulness of the arrest overlapped with the issues in the contractual claim.
50. Whilst that element of overlap in the factual issues made the conclusion reached in *The Damianos* an “*a fortiori*” case, it does not seem to me to follow that such an overlap is an essential element. The point that the arrest was a direct consequence of a contractual claim and therefore closely connected to the contract and the legal relationship there created, remains good whether or not the ground for attacking the validity of the arrest in the given case is that the contractual claim is “*bad*” or, as here, the contention that there simply is no contractual claim to found the arrest because (as the Defendant alleges) the Claimant has misidentified who is the owner of the arrested ship.
51. I draw some further support for that approach from *London Arbitration 8/04* (Lloyd’s Maritime Newsletter 14 April 2004). That was a decision of an ad hoc arbitration panel on whether claims for losses caused by alleged wrongful arrests fell within the scope of a clause referring to arbitration any disputes between the parties to the charter. The charterers argued that there were no issues of fact in common, but the panel took a broad view, holding that the owner’s claims formed part “*if not of a seamless web, then at least of a thread that was sufficiently continuous*”. The High Court refused leave to appeal, on the footing that that decision was not wrong, let alone obviously wrong. Whilst the case was not concerned with the application of the 1968 Convention, it

nonetheless is of some relevance as supporting a generous interpretation of a broadly drafted jurisdiction clause.

52. In conclusion, it seems to me more consistent with *Fiona Trust* that I should take a broad view of clause 93, such that where there is an issue between the parties as to whether damages are recoverable for an allegedly wrongful arrest made in seeking security for claims under the charter, that is a claim “*in connection with*” the charter and therefore this Court has jurisdiction pursuant to Article 17 of the 1968 Convention.
53. The exclusive jurisdiction conferred on this Court by Article 17 is, however, qualified to this extent: it is well established that steps taken in another jurisdiction in order to obtain security for a claim do not amount to a breach of an exclusive jurisdiction clause in favour of this Court: *The Kallang (No. 2)* [2009] 1 Lloyd’s Rep 124 at [75]; *The Lisboa* [1980] 2 Lloyd’s Rep 546.
54. It is a non-sequitur, however, to contend (as the Claimant sought to argue) that just because Article 24 allows this strictly limited carve-out, so as to prevent the act of obtaining security for a claim from being treated, in itself, as a breach of Article 17, that it therefore follows that a substantive claim for damages for tortious conduct in connection with obtaining security cannot fall within the scope of Article 17. *The Damianos* and *London Arbitration 8/04* are examples where such claims were held to come within the scope of a jurisdiction clause and, had either of those been a Convention case, it would have followed from that finding that Article 17 was engaged.
55. Moreover, it is one thing to say that Article 24 may afford an alternative forum, in that a claim for damages consequent on the obtaining of provisional relief might in principle be brought in the Court which granted that relief, without that involving a breach of Article 17, and quite another to treat Article 24 as mandatorily depriving a party of the option of bringing such a claim in the Court the parties have otherwise chosen, pursuant to Article 17.
56. Given that the Supreme Court of Gibraltar is seised of the arrest proceedings, the question becomes what consequences flow from that, in terms of the operation of Articles 21 and 22.
57. The Defendant asserts it would not have standing under Gibraltar law, as a time charterer, to bring a claim for wrongful arrest in Gibraltar. I need not determine that point of expert evidence for present purposes (although one may expect it will feature in due course in debate between the parties as to whether English tort law can be relied upon to circumvent that problem). Assuming that the tort claims could in principle have been advanced either in the Supreme Court of Gibraltar (pursuant to Article 24) or in this jurisdiction (pursuant to Article 17, albeit on a non-exclusive basis, due to the interaction with Article 24), the fact is that the Defendant has chosen not to advance those claims in Gibraltar. For the reasons I develop below, the tort claims are not the “*same*” as the arrest claim. The mere fact of indicating an intention to defend the arrest claim does not result in the Supreme Court of Gibraltar being seised of the tort claims, the nature of the defence being irrelevant for these purposes (*The Alexandros T* [2013] UKSC 70 at 887F) and the tort claims in any event involving, as they do, matters that go beyond any such defence. Still less is that the case, given the express reference to contesting the jurisdiction.

Is there any alternative basis for jurisdiction?

58. Before I turn in more detail to Articles 21 and 22, however, I should address the alternative arguments the Defendant relies upon for founding the jurisdiction of this Court, in case I am wrong in my conclusion that jurisdiction can be founded on Article 17.
59. Article 4 of the 1968 Convention permits jurisdiction to be established, as against a party not domiciled in a Contracting State, such as the Claimant, in accordance with English law. That includes the principle that this Court will have jurisdiction where a party has submitted to the jurisdiction of this Court.
60. Article 18 is directed, specifically, to submission by “*entering an appearance*”. In this context, argument before me was directed to whether it was somehow incumbent on the Claimant to file an acknowledgment of service contesting the jurisdiction within 28 days of service of the Defence and Counterclaim, despite the absence of any such express provision in the CPR, and whether the Claimant had waived its right to object to jurisdiction in respect of the Counterclaim because it had sought an extension of time for the Reply and Defence to Counterclaim. As regards the latter point:
- a. I do not consider there would in any event have been a waiver (if that is a relevant question). An extension of time was necessary to enable the Claimant to have the time it needed to prepare its pleading in response to those counterclaims which it is common ground this Court has jurisdiction to hear. Unlike *Global Multimedia International Ltd v ARA Media Services* [2006] EWHC 3612 (Ch) (on which the Defendant relied in this respect) those steps are perfectly well explained in the eyes of the putative disinterested observer by the necessity to defend the other counterclaims, as opposed to being explicable only on the assumption that jurisdiction in respect of the tort claims was conceded. Seeking time for that legitimate purpose and then putting in a Reply and Defence to Counterclaim which addresses the other counterclaims on their merits, but which contests jurisdiction on the tort claims (without engaging in the merits), would not amount, objectively, to a submission to the jurisdiction (if that issue did depend on how the Claimant has responded to the counterclaim).
  - b. In those circumstances, the Court would have discretion to extend time, if it were necessary to do so, and the mere fact that 35 days, rather than 28, had passed by the time that pleading was served would not, of itself, be a sufficient reason to deny the Claimant opportunity to contest the jurisdiction, in circumstances where there was no suggestion of any prejudice having resulted from that delay.
61. However, it is not clear that, as against a party not domiciled in a contracting state, it is always necessary to bring the case within the scope of Article 18 (treating the counterclaim as if it was an originating claim) if the position under domestic law is that jurisdiction can instead be founded on Article 4 alone.
62. The Claimant relied on case 48/84, *Spitzley v. Sommer Exploitation SA* [1985] ECR 787. That related to a situation where both parties were domiciled in contracting states and the question as formulated for the ECJ was specifically whether the Claimant, who had chosen to commence proceedings in the Defendant’s domicile rather than in the

jurisdiction designated in the contract, had “*entered an appearance*”, within the meaning of Article 18, so as to be precluded from contesting jurisdiction in respect of a set off, unrelated to the claim, on the basis of Article 17. It was held that the Claimant had entered an appearance in the requisite sense by submitting arguments as to the merits of the Defendant’s claim for a set off without contesting the jurisdiction of the Court in respect of those claims. If, therefore, the correct question is whether the Claimant has “*entered an appearance*” within the meaning of Article 18, *Spitzley* would lead to the conclusion that jurisdiction cannot be founded on that Article.

63. Dicey, Morris & Collins on the *Conflict of Laws* (15th Ed) suggests, however, that English domestic law takes a broader approach as to whether jurisdiction is established in respect of a counterclaim against a Claimant not domiciled in a Contracting State. The Defendant relied on the following passage (footnotes omitted):

*“A person who begins proceedings in general gives the court jurisdiction to entertain a counterclaim against him which may extend to cases in which, if separate proceedings were to be brought, permission to serve process under CPR, r.6.36 and PD6B, para.3.1, i.e. Rule 34, might not be obtainable. Although it is sometimes said that it is not necessary that the counterclaim be related to the claim, the true principle is that a counterclaim is allowed so that justice can be done as between the parties. In English law this principle is given effect by the rule that the court may require a counterclaim to be disposed of separately.”*

64. I was not taken to any of the (numerous) cases referred to in footnotes to that paragraph. I can see that there might be an argument that English law treats the commencement of proceedings here as a submission by the Claimant to the jurisdiction as regards any counterclaim which the Court considers ought, in justice, to be heard together with the claim. On that footing, there could on that basis be jurisdiction for the purposes of Article 4 without the Court having to engage in a rather strained application of rules relating to acknowledgement of service and so forth in order also to bring the matter with Article 18. A claimant wishing to contest whether there was jurisdiction on that basis would put in issue by its Reply and Defence to Counterclaim whether the Court should decline jurisdiction on the footing the particular Counterclaim was not one which justice required to be tried with the claim and, on the contrary, that another forum was more appropriate for it.
65. Brussels 1 introduced a specific Article dealing with jurisdiction in respect of Counterclaims (Article 8(2)) which is not to be found in the 1968 Convention. Article 8(2) provides that as against a party domiciled in a Contracting State there will be jurisdiction in respect of “*a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending*”. That is plainly far narrower than the broad approach which, according to Dicey, applies as against a party not domiciled in a Contracting State. However, the very fact that Article is limited to parties domiciled in a contracting state is significant.
66. Be that as it may, it seems to me that this possibility was insufficiently explored in submissions for me to form a definitive view. As I say, I was not referred to the cases Dicey cites in support of it and there is the obvious difficulty (on which the Claimant relies) of whether this can be satisfactorily reconciled with *Spitzley*. I therefore base my

conclusions on jurisdiction on my analysis of the application of Article 17, above, and leave this issue to be determined in a case where it necessarily arises. I am not convinced it would make a practical difference to the outcome, in any event, in that if it were right that jurisdiction could in principle be founded on the alternate ground identified by Dicey, then it seems to me that the Claimant is correct in the submission that the question would then become whether as a matter of discretion the Court should decline jurisdiction on grounds of: (i) comity and/or (ii) Forum Non-Conveniens, and/or (iii) case management. That would to a significant degree (although I accept not completely) overlap with the matters that in any event fall to be considered in the context of Article 22, below.

### Article 21

67. I can deal quite shortly with the argument under Article 21.
68. For the purpose of determining whether the proceedings before the Supreme Court of Gibraltar and before this Court involve the same claims and the same object, I must focus on the causes of action involved: *The Alexandros T* [2013] UKSC 70 at [51]. The Supreme Court of Gibraltar is seised of the Claimant's claim to arrest the "POLA DEVORA". The technical notion (common to Gibraltar law and English law) that an arrest involves a claim *in rem* and a claim *in personam* is for these purposes a distraction, since it is necessary to adopt an independent and autonomous interpretation: *The Alexandros T* at 887B.
69. Identity of cause means having the same facts and rules of law relied on as the basis for the action. Identity of object means having the same end in view (*loc cit*). The factual and legal foundation of the arrest claim is the assertion that the Claimant has a contractual claim for unpaid hire against the beneficial owner of the "POLA DEVORA". The object of the arrest claim is (expressly) solely to obtain security for the substantive contractual claims, which the Claimant advances only in this jurisdiction.
70. The arrest claim plainly does not involve either the same cause of action or the same object as the Defendant's tort claims seeking to recover damages for wrongful arrest, which are advanced solely by way of counterclaim in this jurisdiction. The factual and legal foundation for that counterclaim needs, on any view, to travel substantially beyond the matters the Claimant relies on for its own cause of action and the object of the counterclaim is to recover damages.
71. It is not sufficient for these purposes that a common issue might arise as regards whether the arrest was wrongful: *The Alexandros T* at 887H. That issue would, in any event, arise by virtue of the defence to the arrest (which is not relevant for the purposes of Article 21, although certainly relevant when one comes to Article 22). In any event, the wrongfulness of the arrest (which must on any view be a matter of Gibraltar law) is, even if established, not in and of itself determinative of the claim for damages in tort, whether that damages claim is also governed by Gibraltar law and involves establishing malice or gross misconduct, or whether (as pleaded) it is governed by English law and requires proof of the additional elements involved in the various torts on which the Defendant relies.

72. It follows that, although the Supreme Court of Gibraltar was seised in respect of the arrest claim before any proceedings were commenced in this Court, Article 21 does not apply and it is not mandatory for this Court to decline jurisdiction over the counterclaim in favour of the Supreme Court of Gibraltar.
73. By the same token, an acknowledgment of service in the Gibraltar arrest proceedings does not amount to a submission to that jurisdiction which would preclude the Defendant from raising its distinct tort claims here (contrary to the Claimant's submissions). The Defendant in any event took the precaution of ticking the box indicating an intention to contest the jurisdiction as well as an intention to defend. The submission of that form made the Defendant a party to the Claimant's cause, in the form of the claim for an arrest by way solely of security, so that one of the three requirements for Article 21 is satisfied (i.e. identity of parties), but that is irrelevant if the other two requirements are not.

### Article 22

74. Neither Skeleton Argument had referred to Article 22 of the 1968 Convention, but the Claimant specifically sought to rely on Article 22 at the hearing, as a fallback from its position on Article 21. Whilst the Claimant's Skeleton Argument had put forward arguments based on *forum non conveniens*, in the event the Court did have jurisdiction, contrary to the Claimant's case, the Claimant had not sought, specifically, to develop a case based upon Article 22. It was only in oral submissions that the Claimant first developed the argument that the proceedings in Gibraltar are a related action within the meaning of that Article. To that end, the Claimant, at the beginning of the hearing, added to the already substantial number of authorities before the Court, *Research in Motion v Visto* (both at first instance [2007] EWHC 900 (Ch) and on appeal [2008] EWCA Civ 153) and, following the short adjournment, *The Alexandros T* [2013] UKSC 70 (the latter in fact also being relevant, as noted above, to Article 21).
75. This development evidently took the Defendant rather by surprise. That is understandable since the Claimant's primary case had appeared from the Skeleton Argument to be focussed on the construction of Clause 93 and arguments as to *forum non conveniens*, with only a passing reference to Article 21 and none to Article 22. That said, the argument based on Article 22 is properly open to the Claimant and in practical terms might be said to serve as a hook from which to hang the proposition that this Court has a discretion which it should exercise to decline jurisdiction, an argument which the Claimant was in any event already making on the broad ground of *forum non conveniens*.
76. Article 22 requires comparison of the two sets of proceedings. The first question is whether that comparison shows them to be "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*". If so, the second question, given that as between the two sets of proceedings in question this Court is on any view second seised, is whether as a matter of discretion (the language of Article 22, in contrast to Article 21, is "*may*") this Court should stay the tort claims or decline jurisdiction in respect of them.
77. There is, in principle, a risk of irreconcilable judgments on the issue as to whether the Defendant was the beneficial owner of the "POLA DEVORA" and hence whether the arrest was wrongful as a matter of Gibraltar law, issues which would (but for the



stay) fall to be determined in the proceedings before the Supreme Court of Gibraltar and which are also the necessary (albeit not sufficient) foundation of the tort claims advanced in the counterclaim in these proceedings. The stay of the Gibraltar proceedings for the purpose of ADR does not alter the fact that the Supreme Court of Gibraltar remains, for these purposes, seised of those proceedings, which have not been finally concluded: see by way of analogy *The Alexandros T* at [78] and [81].

78. That overlap in the issues does make the actions “*related*”, even if there are factors that substantially mitigate that risk in this particular case. Such mitigatory factors come into account as part of determining how to exercise the discretion under Article 22, rather than as a basis for saying that Article is not engaged. That is clear from authorities which have addressed the correct approach to the equivalent article in the Brussels Regulation, Article 28.
79. The Court of Appeal in *Research in Motion v Visto* [2007] EWHC 900 (Ch) had said (at [37]) that:

“the Article leaves it open to a Court to acknowledge a connection, or a risk of inconsistent judgments, but to say that the connection is not sufficiently close, or the risk is not sufficiently great, to make the actions related for the purposes of the Article.”

However, that does not appear to be a correct approach, for reasons I develop below. *Visto* is a case which was otherwise preoccupied with the question of which Court was first seised, which was complicated on the facts of *Visto* and is straightforward on the facts before me. Whether one takes this action as a whole or focusses on the counterclaim as if it was a separate action, either way this Court is second seised.

80. The Supreme Court has since explained, in *The Alexandros T* at [92] (citing the opinion of the Advocate General in *Owens Bank Ltd v Bracco* (Case C-129/92) [1994] QB 509) that such factors go to how the discretion under the Article should be exercised, rather than pre-empting the need to exercise it. Lord Clarke there summarised the factors relevant to the exercise of the discretion in these terms:

*“The circumstances of each case are of particular importance but the aim of art 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay. Indeed, he [the Advocate General] appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion the Advocate General said at para 79 that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question.”*

81. Furthermore, it is clear that it is relevant to take into account whether the matter in question comes (or arguably comes) within the scope of a jurisdiction clause that gives jurisdiction to the Court second seised: *The Alexandros T* at [95].
82. I take that guidance to apply with equal force to Article 22 of the 1968 Convention.
83. It seems to me that the countervailing factors outweigh any initial presumption in favour of a stay or declining jurisdiction:
  - a. The overlap in the issues is of limited scope;
  - b. The proceedings in Gibraltar have barely got out of the starting blocks, having been stayed before any steps had been taken beyond the Defendant having acknowledged service (with the reservation described above);
  - c. As matters stood at the hearing, there appeared to be only a limited risk, in practical terms, of the proceedings in Gibraltar being reanimated in such a way as to produce an inconsistent finding, in the event that this Court assumes jurisdiction (I elaborate on this point below);
  - d. Whilst the Supreme Court of Gibraltar had exclusive jurisdiction in respect of authorising the arrest, the arrest has been lifted. Whilst technically the *in personam* claims remain in being, the substance of the Claimant's claims is being litigated here, in circumstances where the action in Gibraltar was expressly brought solely for the purpose of obtaining security. In those circumstances, it does not seem to me that the Supreme Court of Gibraltar should be regarded as more "*proximate*" to the subject matter of the case, even though of course the issue of the wrongfulness of the arrest is governed by Gibraltarian Admiralty law and evidence as to the usual practice in that Court for evidencing ownership may be relevant;
  - e. For the reasons developed above, the tort claims come within the scope of the clause designating this Court as the forum for resolving the substantive disputes between these parties in connection with the charter. Even if the exclusivity of that clause is tempered by Article 24, such that Gibraltar would also have been an available alternative forum for the tort claims, the Defendant has not elected to bring them there. It is more consistent with the underlying policy of respecting choice of jurisdiction whilst avoiding a proliferation of parallel proceedings that all live matters should now be consolidated here;
  - f. As regards which Court is better placed to decide the issues raised by the tort claims, whilst that will include determining some issues of Gibraltarian law, those can be addressed by way of expert evidence. If the Defendant is correct in its assertion that the relevant torts are governed by English law (as to which I express no view) then the scope for Gibraltarian law will be quite limited. Even supposing the issues of Gibraltarian law may be more extensive than that, that factor is still of limited weight considering matters as a whole. Moreover, it is common ground between the experts that Gibraltarian Admiralty law mirrors English law.

84. That analysis largely also covers the matters that were relied on by the Claimant as grounds in respect of *forum non conveniens*. In that respect, the Claimant also contended that as a matter of case management this action should not be complicated and rendered more expensive by the addition of the tort claims. That submission, however, overlooks the fact that the Court is concerned with deciding in which of the two possible jurisdictions those claims should be determined, not that they should not have to be determined at all. If not determined here, and brought in Gibraltar instead, costs would be incurred in respect of legal teams, disclosure exercises and eventual trials in two jurisdictions. Even accepting that consolidating the live issues here necessitates expert evidence, and will expand the issues and the scope of disclosure in this litigation, a one-stop approach is likely to be more efficient.
85. I should say a little more about the risk of mutually irreconcilable judgments. As matters stood at the time of the hearing, it appeared to me that risk was in practice low. It was improbable that the Defendant, who is fighting to bring its tort claims here, would if successful in that objective then do a u-turn and seek to lift the stay in Gibraltar. Nor did it seem to me that I should proceed on the basis that the Claimant, if unsuccessful in its application before me, would then choose to lift the stay and unnecessarily incur the cost of fighting overlapping issues in two jurisdictions. It seemed probable that the Defendant and Pola Rise OOO are related companies (although Mr Steward seemed unprepared to confirm that in Court). At all events, it seemed likely that the latter was likely to have no continuing interest in the active pursuit of the Gibraltar proceedings now that the arrest has been lifted. That, however, was the area of residual risk, such as it was.
86. At the conclusion of and since the hearing, the Defendant has sought to eliminate any residual risk in that respect by offering an undertaking through its solicitors, on behalf of both the Defendant and Pola Rise OOO, not to challenge the arrest of the “POLA DEVORA” in the Supreme Court of Gibraltar if this Court assumes jurisdiction in respect of the tort claims. That undertaking was expressed to be contingent on that being the outcome of this application (which would include the outcome of any appeal) but otherwise irrevocable. The precise wording will be recorded in the order disposing of the application. That undertaking is helpful in removing any possible element of residual risk from the equation, although as I say it seemed reasonable to consider that risk to be quite limited in any event. The late emergence of the argument on Article 22 explains why the question, specifically, as to whether there was a residual risk of irreconcilable judgments was not focussed upon any earlier (and did not feature in the Claimant’s list of factors bearing on *forum non conveniens*). Had it been raised, that undertaking might perhaps have been offered sooner. As it is, I do not regard the undertaking as being entirely transformative of the case.

### Conclusion

87. I conclude that, for all these reasons this Court has a discretion, under Article 22 of the 1968 Convention, which in the particular circumstances of this case, including but not limited to the fact that the tort claims come within the scope of a clause conferring jurisdiction on this Court so as to engage Article 17, it is appropriate to exercise so as to refuse to decline jurisdiction or to stay the tort claims, even though this is the Court second seised, as between the two sets of related proceedings. I therefore dismiss the Claimant’s application. I will give directions as to the further conduct of this matter, which the parties are invited to seek to agree.