Neutral Citation Number: [2024] EWHC 2350 (Comm)

Case No: CL-2023-000228

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

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

Date: 17/09/2024

Before :

Stephen Houseman KC
Sitting as a Deputy Judge of the High Court

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Between :

Tumpuan Megah Development Sdn. Bhd.	**Claimant**
- and -	
1. ING Bank N.V.	**Defendant**
2. O.W. Bunker Far East (Singapore) Pte. Ltd.	

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Roderick Cordara KC and Edward Mordaunt (instructed by **Cripps LLP**) for the **Claimant**
Marcus Mander (instructed by **Allen Overy Shearman Sterling LLP**) for the **Defendants**

Hearing dates: 10 & 11 September 2024

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Approved Judgment

This judgment was handed down remotely at 10:30am on Tuesday 17 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Stephen Houseman KC:

INTRODUCTION

1. The present action was commenced by the claimant ("TMD") on Friday 28 April 2023. That was the last clear business day of the limitation period which applies to at least the primary claims against both of the named defendants. The six year anniversary of the key event fell on Tuesday 2 May 2023, the day after May Day Bank Holiday.

2. The first defendant ("ING") was served in London less than a fortnight before the end of the four month duration of validity of the claim form. Without having sought permission to serve the second defendant ("OWB") out of the jurisdiction in the meantime, TMD then applied 16 days before the end of the (presumed) six month validity period for an extension of two months until 28 December 2023 to effect service with the Court's permission upon OWB's liquidators in Singapore. Mr Justice Knowles CBE granted that application on paper on 28 October 2023 ("Knowles Order"). TMD served these proceedings, in a factual sense, on OWB's liquidators in Singapore nine days later on 7 November 2023.

3. By an application notice dated 12 January 2024 both ING and OWB seek a range of remedies the effect of which would be to terminate or suspend the present action at this stage. In summary and in the sequence addressed below:

    (1) OWB seeks to set aside the Knowles Order both as to (a) extension of validity of the claim form under CPR 7.6(2) and (b) permission to serve out of the jurisdiction under CPR 6.36/6.37; alternatively, OWB seeks a mandatory stay of the claim against it under CPR 62.8 and s.9 of the Arbitration Act 1996 ("1996 Act");

    (2) ING seeks to stay or dismiss the claim against it on the basis of abuse of process through vexatious parallel litigation on the part of TMD by reference to two sets of legal proceedings pending in the Malaysian court system: see (4) below;

    (3) come what may, both ING and OWB seek to strike out the present claim on the basis that it is hopeless and abusive (CPR 3.4(2)(a)/(b)) by reason of the preclusive effect of (a) an arbitral award dated 4 February 2020 made in London ("LMAA Award") and/or (b) the Order of Mrs Justice Cockerill dated 13 November 2020 giving effect to such award pursuant to s.66 of the 1996 Act ("Cockerill Order") and/or (c) an arbitral award dated 29 March 2023 made in Malaysia ("AIAC Award"); and

    (4) as a final alternative, ING and OWB seek - and TMD openly offers - a temporary case management stay of the present action to await the outcome of one or both of two pending challenges in Malaysia, namely (a) TMD's curial challenge to the AIAC Award ("TMD Curial Challenge") and/or (b) TMD's challenge to the recognition of the Cockerill Order ("TMD Recognition Challenge").

4. The underlying dispute concerns supply of marine gas oil by OWB to TMD for two vessels in 2014 for a total value of around US$937,353 as found, declared and ordered to be paid by TMD in the LMAA Award.

5. TMD has always disputed the existence of the two supply contracts or such bunker deliveries. On the same basis, TMD has always disputed the existence of any London-seat

arbitration agreement(s) in respect of such alleged transactions or deliveries, the same being found in OWB's standard terms of supply.[1] Such jurisdictional objection was advanced in the London arbitration and rejected in the LMAA Award. No challenge to that jurisdictional ruling was brought by TMD under the 1996 Act. No part of the award or subsequent costs award has been paid by TMD.

6. Some two years into that arbitration, TMD amended its defence to contend that the parties' relationship was governed by a written agreement dated 7 April 2014 ("SOA") which contains a Malaysia-seat arbitration agreement ("SOA-AA"). The LMAA Award dealt with the availability of this ground of objection as well as the meaning and effect of the SOA-AA as a matter of substantive contractual analysis. It determined both aspects against TMD. Notwithstanding such adverse determination, TMD then commenced arbitration against ING and OWB in Malaysia alleging breach of the SOA-AA itself. TMD's claim was found in the AIAC Award to be precluded by the findings in the LMAA Award.

7. The present claim is based on the same alleged breach or breaches of the SOA-AA by ING/OWB by (a) commencing arbitration in London on 2 May 2017 ("London Arbitration") and thereafter pursuing it through to the LMAA Award and (b) successfully opposing (or "*striking out*") the claim brought by TMD against them in the subsequent arbitration in Malaysia ("Malaysian Arbitration") resulting in the AIAC Award, as outlined above. A separate claim is made against ING for the tort of procuring OWB's breach of the SOA-AA, as had also been alleged in the Malaysian Arbitration.

8. The pleaded claim seeks declaratory relief and damages. The declaration sought is that "*the [SOA-AA] is the sole valid and binding agreement between the parties governing all marine bunker fuel sales between them*". The damages claim is unparticularised, but covers at least the legal costs incurred by TMD in relation to the London Arbitration (as respondent) and the Malaysian Arbitration (as claimant). The damages claim is said to exceed the value of the bunkers.

9. Without needing to decide this point, it can readily be seen that the limitation period under s.5 of the Limitation Act 1980 expired on 2 May 2023, i.e. six years after commencement of the London Arbitration. An important effect of the Knowles Order, putting it neutrally, was to avoid at least the primary and dominant claim becoming time-barred as against OWB through expiration of the claim form on 28 October 2023 without service having been permissibly effected upon it out of the jurisdiction.

10. The present action marks a yet further episode in this hard-fought multi-forum litigation concerning events which took place a decade ago and generating legal costs that far exceed the value of the underlying commercial transactions. The essential question is whether it should be allowed to proceed before this Court.

RELEVANT BACKGROUND

11. There is a lot of background. Most of it is procedural in nature, relating to the two completed arbitrations and pending challenges in Malaysia to the legal effect of their respective outcomes. I give a brief summary below.

[1] In light of my conclusions, I do not add "alleged" or "disputed" before reference to these transactions or supplies.

12. TMD says that it and OWB entered into the SOA in April 2014. The existence of this agreement was not disclosed by TMD until it amended its defence in the London Arbitration in July 2019 exactly two years after serving its original defence. It was described as a form of umbrella agreement covering all supplies of marine fuels between the parties.

13. The SOA is governed by Malaysian law and provides (by clause 10) for arbitration with seat in Malaysia. This is the SOA-AA as defined above. The SOA-AA selects and incorporates the rules of the Kuala Lumpur Regional Centre for Arbitration, later and now known as the Asian International Arbitration Centre or 'AIAC' for short. The SOA-AA is worded in familiar terms as regards nexus language and hence the scope of disputes falling within it. There is no reason to believe that it is governed by anything other than Malaysian law. I am not aware of either side contending that this differs from English law for the purposes of ascertaining its existence, meaning or effect. TMD appears to accept that the Limitation Act 1980 applies to claims in respect of the SOA-AA.

14. The corporate group of which OWB formed part collapsed into insolvency in late 2014, not long after the bunker supplies to the two vessels in question. ING exercised its security rights under relevant credit and financing arrangements, and duly notified TMD as a counterparty and trade debtor of OWB. TMD did not pay for the bunkers.

15. The London Arbitration was commenced by ING (assignee) and OWB (assignor) against TMD on 2 May 2017. This followed a determination by the Supreme Court of a test case which established that trade customers were liable to make payment to OWB group vendors: see [2016] UKSC 23.

16. TMD disputed the tribunal's substantive jurisdiction on a root and branch basis. Its amended grounds of challenge included the contention that the SOA-AA was the exclusive and applicable forum-selection bargain covering all dealings between the parties, such that a London-seated tribunal could have no jurisdiction over the claim about unpaid bunkers. TMD thereby invited the tribunal to rule on the meaning and effect of the SOA-AA itself. TMD did not separately allege that ING's or OWB's commencement or pursuit of the London Arbitration was itself a breach of the SOA-AA and did not bring a counterclaim. Its jurisdiction challenge nevertheless and necessarily presupposed such a position. The central issue was whether the SOA-AA was the exclusive and applicable forum-selection agreement covering the two bunker supplies.

17. Pausing there, TMD could at any point from 2 May 2017 (or perhaps earlier) have commenced an arbitration against ING/OWB in Malaysia pursuant to the SOA-AA and/or sought anti-arbitration injunctive relief from that tribunal or the curial court on the basis of its thesis that the SOA-AA was the exclusive and applicable forum-selection agreement. TMD chose instead to challenge jurisdiction within the London Arbitration on the basis that the SOA-AA was the primary and applicable forum-selection bargain.

18. The LMAA Award was issued on 4 February 2020. By this final award, the tribunal rejected TMD's jurisdiction challenge and ordered TMD to pay the sum of US$937,353.24 plus arbitration costs and interest. A further costs award followed. In summary: the tribunal found that the supply contracts had been entered into and the bunker supplies made on terms requiring London-seat arbitration; TMD had waived its right to dispute arbitral jurisdiction by reference to the SOA-AA, pursuant to s.73(1) of the 1996 Act, during the two year period before introducing such contention by amendment; and, even if not so

waived, the SOA-AA on its proper construction only covered disputes about set off and did not oust or supplant the London-seat arbitral bargains applicable to the two specific bunker supply transactions. In short, the LMAA Award was a jurisdiction ruling premised on rejection of TMD's contention that the SOA-AA was the exclusive and applicable forum-selection agreement. I refer to this as the "Jurisdiction Ruling".

19. TMD did not seek to challenge the LMAA Award under s.67 or any other provision of the 1996 Act during the applicable 28 day period. Nor has it sought any time extension to do so since. Instead, just over four months after the award was made available, TMD commenced the Malaysian Arbitration against ING and OWB on 11 June 2020.

20. TMD sought to advance essentially the same claim in that arbitration as now pleaded in the present action, i.e. breach of the SOA-AA by commencement and pursuit of the London Arbitration through to the LMAA Award. TMD also alleged (as here) that ING was liable in tort for procuring OWB's alleged breach of the SOA-AA.

21. The respondents made a preliminary jurisdictional objection based upon the legal effect of the Jurisdiction Ruling in the LMAA Award. That threshold objection was upheld by the tribunal in the AIAC Award issued on 29 March 2023.

22. The AIAC Award contains a detailed analysis of the overlapping issues between TMD's claim based on breach of the SOA-AA and the findings in the LMAA Award. It concludes in emphatic terms that the former was precluded by the latter as a matter of *res judicata* analysis. On that basis, the tribunal did not consider it necessary to consider ING's separate jurisdictional objection (i.e. that it is not bound by the SOA-AA at all) or any substantive merits of TMD's claim as to the correct contractual position. TMD applied to the High Court in Malaysia on 5 July 2023 to set aside the AIAC Award on grounds of alleged bias and denial of natural justice. This is the TMD Curial Challenge as defined above.

23. Rather than seek to enforce the LMAA Award against TMD in Malaysia through the New York Convention ("NYC") and local statutory provisions, ING and OWB instead applied to the Commercial Court in London on 11 November 2020 under CPR 62.18(1)(a) in CL-2020-000740 for leave to enforce such award pursuant to s.66 of the 1996 Act. One of the purposes in doing so was said to be potential future enforcement (via recognition) against TMD's assets in Malaysia. It can also be seen as a legitimate defensive strategy in terms of reinforcing any *res judicata* effect of the LMAA Award in this jurisdiction at a time when the Malaysian Arbitration had been initiated just over five months earlier: see paragraph 92 below.

24. The Cockerill Order was made without notice and on paper in accordance with normal practice on 13 November 2020. In the usual way it incorporated into the body of a court order the dispositive relief in the LMAA Award; and it gave TMD a prescribed period of time to challenge the order, including for lack of arbitral jurisdiction under s.66(3), before it would then subsequently take effect and become capable of practical enforcement or execution by the judgment creditors.

25. TMD did not avail itself of its statutory right to challenge arbitral jurisdiction as preserved and provided for in the Cockerill Order. The witness evidence filed by TMD in support of the Knowles Order stated as part of the background that TMD had been "*unable to make its application*" to set aside the Cockerill Order "*within the applicable time frame*" but no details were given as to such inability. I understood TMD's position through counsel at the

present hearing to be that it had *chosen* not to apply under s.66(3) to challenge arbitral jurisdiction in this Court, consistent with its right to elect between modes or places of challenge to arbitral jurisdiction discussed in (3) below.

26. A certificate was issued under s.10 of the Administration of Justice Act 1920 in respect of the Cockerill Order on 22 December 2020. This enabled recognition to be sought as a judgment in Malaysia pursuant to the applicable statute in that country, the Reciprocal Enforcement of Judgments Act 1958. Recognition proceedings have been on foot in Malaysia since January 2021. The first instance registration order was made without notice on 22 March 2021.

27. TMD has challenged such registration and sought a trial on the merits of arbitral jurisdiction in the Malaysian courts. This is the TMD Recognition Challenge as defined above. The Court of Appeal in Malaysia decided in late 2023 to allow TMD's appeal and direct such a trial, on the basis that statutory registration/recognition of the Cockerill Order should not prejudice the ability of TMD (qua award debtor) to challenge arbitral jurisdiction pursuant to the NYC scheme as enshrined in s.39 of the Malaysian Arbitration Act 2005.

28. The Malaysian court is currently considering whether to stay the TMD Curial Challenge pending the final outcome of the TMD Recognition Challenge, which is now pending before the Malaysian Federal Court after it granted leave to appeal this May in respect of the Court of Appeal's decision late last year. Both of TMD's challenges therefore remain pending in the Malaysian court system at the present time.

ANALYSIS OF THE ISSUES

29. I follow the sequence of issues numbered (1) to (4) in the introductory section above.

(1) OWB's Applications: Knowles Order & Section 9 Stay

30. OWB seeks to set aside both the extension of validity and permission to serve out of the jurisdiction as granted without notice on paper on 28 October 2023; alternatively, it seeks a stay of the claim against it under s.9 of the 1996 Act. The stay application is contingent, because this Court has to be seised of the relevant claim in the first place in order to have a power to stay its own process.

31. I deal with extension first, because if that is set aside it follows that OWB has not been validly served and that is the end of the claim against it. There is no contingent application, and nor could there be given the nature of the contingency, to extend validity retrospectively under CPR 7.6(3) or for deemed service (CPR 6.15(2)) or to dispense with service altogether (CPR 6.16).

(a) Extension of validity under CPR 7.6(2)

32. As already noted, TMD applied for its extension with just over a fortnight left to run on the (presumed) six month period of validity for serving a foreign-domiciled defendant. TMD did not have requisite permission to serve the claim form upon OWB at such time. The standard four month validity period had expired seven weeks earlier on 28 August 2023.

33. OWB is content to assume that this was a prospective application under CPR 7.6(2). The touchstone is 'good reason' to grant the requested (or any lesser sufficient) extension, as

compared with the much tougher test for retrospective extensions under CPR 7.6(3). Here, the extension sought was two months; although, in the event, only another nine days were needed to effect service (if valid) upon OWB's liquidators in Singapore.

34. The Court's approach to using its power under CPR 7.6(2) is summarised by Carr LJ (as she then was) in *ST v. BAI (S.A.)* [2022] EWCA Civ 1037 at [62]-[65] and discussed in 2024 White Book, Volume 1 at 7.6.2 (pp.381-382). As a broad proposition and starting point those who are amenable to the civil jurisdiction of the English Court have a legitimate expectation that they will be sued within the applicable limitation period and served with such proceedings within the original period of validity of the claim form and, it might be added, by a method of service applicable in their place of domicile. A claimant must provide a proper justification for elongating this initiating process, consistent with the policy of legal finality in personal and business affairs.

35. The natural focus of the inquiry is the explanation provided by the claimant for its actual difficulty in serving or inability to serve the claim form on the defendant in the relevant period. This is what justifies the need for more time to effect service. The inquiry is essentially a practical one.

36. As noted above, the touchstone is 'good reason' although that phrase does not appear in the rule. This formulation chimes with CPR 6.15(1) for service by alternative method given the legitimate expectations of the defendant as a starting point, as noted above. The Court may nevertheless grant an extension under CPR 7.6(2) even absent a good reason.

37. Where a limitation defence available to the relevant defendant is or may be prejudiced by such extension, this is an important consideration for the Court to take into account in weighing the balance of injustice - such that a claimant needs to show that it has taken "*reasonable steps*" (cf. "*all reasonable steps*" in CPR 7.6(3)(b)) to effect service during the relevant period. It has been said that even prospective extensions will only exceptionally be granted where this deprives a defendant of an accrued limitation defence, although this is more a reflection of empirical scarcity than a gloss on the test itself.

38. As regards the limitation position, the claim for breach of contract against OWB (as with ING) is primarily framed by reference to commencement of the London Arbitration on 2 May 2017. TMD pleads that its own commencement of the Malaysian Arbitration four months or so after receipt of the LMAA Award was an "*attempt to mitigate the potential loss that it would occur as a result of*" such breach of the SOA-AA. Even if possible to characterise OWB's conduct in resisting the Malaysian Arbitration as involving one or more distinct breaches of the SOA-AA, which seems a fraught proposition, the fact that TMD's own pursuit of such arbitral process is pleaded as *mitigation* of the loss (to be) suffered by reason of the London Arbitration and LMAA Award may suggest that all the damages claimed flow from that initial breach on 2 May 2017. It is not necessary to decide this point for present purposes. It suffices that the primary breach claim itself became time-barred on 2 May 2023 irrespective of the subsequent period of time during which loss is said to have been suffered for the purpose of claiming damages.

39. As regards the claim for declaratory relief, it is accepted on behalf of TMD that its limitation treatment is akin to a simple contract claim and that such claim for equitable relief likewise became available on 2 May 2017. In so far it constitutes a distinct claim, it also became time-barred on 2 May 2023.

40. In the present case, TMD did not take reasonable steps to serve the claim form on OWB at any point prior to making its application on 12 October 2023. Absent agreement on the part of ING's solicitors in London to accept service upon OWB, TMD required permission of the Court to serve OWB out of the jurisdiction. It had not sought such permission when issuing or during the first five and half months since commencing the action.

41. TMD's solicitors asked ING's solicitors in London on 22 May 2023 whether they were authorised to accept service on behalf of OWB. A negative response was given on 5 June 2023. TMD did not seek permission for another four months and one week. It appears from a further (unsolicited) witness statement provided after the first day of the hearing before me that a draft application was prepared by around 27 June and some foreign law advice obtained as to service upon liquidators in Singapore on 26 July. That advice has not been disclosed and the evidence does not say when it was sought or how long it took to obtain or what form it took. The advice was provided by the same law firm which had been representing TMD throughout the history of this dispute.

42. TMD's evidence in support of the paper application before Knowles J explained difficulties during some of the period due to new solicitors having become involved, existing leading counsel's availability and the need for various investigations in Malaysia and Singapore. No dates are given for these inquires, nor any details, nor how their outcome affected TMD's ability to seek permission for service out earlier so as to attempt service upon OWB in the meantime.

43. Some additional detail is provided in the further witness statement I allowed to be admitted on the second day of the present hearing. The need to cover matters by way of full and frank disclosure is invoked as a key explanation for why it took so long to make the application; but it is difficult to understand how that could explain the entire period involved. I am unable to infer, for example, that the time taken to bottom out full and frank matters created a genuine obstacle to making an application for permission at an earlier stage. The onus is on TMD to explain these matters to the Court.

44. This explanation does not, in my judgment, show that reasonable steps were taken by TMD to effect service with relevant permission upon OWB prior to 12 October 2023. What was required was a simple application for permission to serve OWB's liquidators in Singapore, something which would have been easier and briefer than the application eventually made seeking the same as well as the extension of validity from six to eight months. If such permission had been sought and obtained in July-September, service could have been effected quickly as later occurred in a functional sense following the Knowles Order.

45. No skeleton argument was provided to Knowles J when considering TMD's application on the papers last October. Although such an experienced and careful commercial judge can be expected to know the approach to the Court's power under CPR 7.6(2), the supporting witness statement did not clearly identify the need to show "*reasonable steps*" to effect service on OWB prior to the application being made given the intervening expiration of limitation. Nor did it clearly explain that the limitation period applicable to (at least) the primary breach claim had since expired. The supporting evidence alluded to the *possibility* of the present claim becoming time-barred on the sixth anniversary of the commencement of the London Arbitration such as to motivate the issuance of proceedings on a protective basis in late April 2023. As discussed above, this was no mere possibility: the primary (and perhaps entire) claim became time-barred on 2 May 2023.

46. I do not find, and need not find, that Knowles J was misled or misinformed in any material way. My jurisdiction on the present application is to determine in light of full argument between the parties, including further supporting evidence admitted part-way through this hearing as an indulgence to TMD, whether there was a sufficient basis for granting the extension sought under CPR 7.6(2). I have concluded that there was not. I reach this conclusion without making or implying any criticism of the legal team who represent TMD and taking into account that TMD's current solicitors were only instructed on 25 April 2023 just days before expiry of the limitation period, as described above.

47. Further and in light of the circumstances of the present case as a whole, including its extensive adversarial background and how close to the end of the limitation period it was commenced, I am satisfied that refusing *any* extension to the validity of the claim form is in accordance with the overriding objective of the CPR. This is so notwithstanding that only nine more days would have been needed to serve OWB's liquidators in Singapore.

48. In short, TMD failed to show a good (or other) reason for any extension to the validity of the claim form beyond 28 October 2023. This is so even if the grant of permission to serve OWB out of the jurisdiction was justified at that time. As discussed below, it was not. The extension to validity of the claim form therefore served no practical purpose. This provides a separate basis for setting aside such extension, in my judgment.

49. My conclusion on this limb of OWB's application means that the claim against it stands dismissed. I nevertheless consider below its jurisdiction challenge and s.9 stay application, which are themselves related to one another to some extent.

(b) Permission as to service under CPR 6.36/6.37

50. OWB challenges jurisdiction and seeks to set aside the separate permission as to service contained in the Knowles Order. OWB challenges all three stages of the familiar test: threshold merits, jurisdictional gateways and proper forum.

51. Threshold merits and gateway can be taken together. The same point underpins both albeit with different standards of proof. OWB says that the present claim is precluded by the LMAA Award and/or Cockerill Order and/or AIAC Award. As such, it is hopeless and abusive. It therefore fails on threshold merits and, by definition, none of the three invoked gateways can be satisfied: two of them (PD6B 3.1(7)&(8)) presuppose a contract which has been broken in the way(s) pleaded, namely the SOA-AA; whilst the third (PD6B 3.1(3)) requires that it be reasonable for the Court to try the anchor claim against ING based on (its own alleged) breach of the SOA-AA or involvement in OWB's equivalent wrongdoing. Whether or not the present claim is precluded as a matter of English law is addressed in (3) below, albeit TMD has the burden of proof on these jurisdictional elements.

52. Aside from all this, and again bearing in mind the burden upon TMD, OWB says that England is not the proper place for the present claim because it belongs (if anywhere) in a further Malaysia-seated arbitration pursuant to the SOA-AA according to its own internal and therefore inescapable logic. The spectre of a further arbitration in Malaysia is not something OWB (or ING) welcomes or encourages. It is nevertheless the agreed forum for the pleaded claim according to its own necessary premise.

53. The real point on proper forum seems to be whether the present claim against OWB is susceptible to being stayed under s.9 of the 1996. If this is the case, then this Court is not

(by definition) the proper place for such claim, irrespective of any balance of connecting factors or practical considerations that would normally feature in an assessment of proper forum: see *A & B v. C & D* [1982] 1 Lloyd's Rep 166; *Golden Ocean Group Ltd. v. Humpuss Intermoda Transportasi Tbk Ltd. & another* [2013] EWHC 1240 (Comm); [2013] 1 CLC 929.

54. The fact that OWB is part of a corporate group which is now a decade into formal insolvency might also raise questions as to the practical impetus or purpose of it being sued for damages alongside ING. TMD has sued them both because ING has always denied being bound by the SOA-AA (see paragraph 22 above). Hence only OWB seeks a s.9 stay.

(c) Stay under s.9 of the 1996 Act

55. It is common ground that the pleaded claim against OWB for breach of the SOA-AA falls within the wording of the SOA-AA itself.

56. As noted above, TMD claims in these proceedings a declaration to the effect that the SOA-AA is the "*sole valid and binding agreement between the parties*" for all purposes, including whatever jurisdictional rights and obligations cover the bunker supplies which are the subject of the LMAA Award. TMD doesn't just accept that the SOA-AA remains on foot, it positively avers this position.

57. The present claim against OWB is, therefore, liable to be stayed under s.9(1) unless TMD can invoke one of the exceptions in s.9(4).

58. TMD says the SOA-AA is "*inoperative*" or "*incapable of being performed*" for present purposes, notwithstanding that it remains extant as a matter of contractual analysis. TMD further says that, even if this is not so, the Court should in its discretion decline to stay the claim because such a stay would serve no "*real or proper purpose*" citing observations made by Lord Hodge in *FamilyMart China Holding Co. Ltd. v. Ting Chuan (Cayman Islands) Holding Corp.* [2023] UKPC 33; [2024] 1 All ER (Comm) 697 at [64] and *Republic of Mozambique v. Privinvest Shipbuilding SAL (Holding) and others* [2023] UKSC 32; [2023] Bus LR 1359 at [52].

59. TMD's case under s.9(4) is that, as matters stand, any further Malaysia-seated arbitral tribunal will inevitably reach the same preliminary conclusion as the first tribunal did in the AIAC Award. It is said, with candour and clairvoyance, that a new tribunal will refuse to entertain this claim on its merits because of the preclusive effect of the LMAA Award and/or the AIAC Award. A further tribunal would therefore lack any remedial competence in respect of the present claim; or, to put it into the language of *FamilyMart* at [69]-[78], the present claim suffers from "*remedial non-arbitrability*" as a matter of practical reality or inevitability.

60. Whether or not this is the case in terms of the potential or even inevitable practical outcome of a further arbitration in Malaysia comes nowhere near showing that the SOA-AA itself is "*inoperative*" or otherwise "*incapable of being performed*". The fact that a putative arbitral respondent has a threshold objection to the successive or repetitive and hence abusive pursuit of a claim against it in arbitration is, if anything, proof of the arbitration agreement (being capable of) being operated or performed in a practical sense.

61. Put another way, if that preliminary answer based on preclusion or abuse forecloses any fuller investigation as to limitation or substantive merits or (therefore) availability of any interim or final remedial power arising on the part of the arbitral tribunal in respect of such substantive claim, that is just a consequence of a threshold objection working *within* the arbitral process. The tribunal would still exercise a form of remedial power in dismissing the claim as a matter of admissibility or jurisdiction or procedural termination, as occurred in the AIAC Award.

62. This predicted outflow does not denude such tribunal of all functional or even remedial competence, nor could it mean that the relevant claim lacks the characteristic of remedial arbitrability. The concept of remedial non-arbitrability is a narrow one. It concerns situations where the award of certain statutory remedies (e.g. winding up of a company) is "*beyond the jurisdiction which the parties <u>can</u> confer through their agreement on an arbitral tribunal*" or, put another way, where the parties "*<u>cannot</u> confer on the arbitral tribunal the power to give certain remedies*" (*FamilyMart* [70] & [74], emphasis added). This concept has no application to the present case where damages are sought for breach of contract and in tort, together with declaratory relief as to the subsistence and primacy of the relevant contract itself.

63. TMD's position on s.9(4) amounts to saying that because its claim is bound to fail at the threshold stage in any Malaysia-seated arbitration, the SOA-AA should be regarded as spent for the purposes of such claim. This is a *non sequitur*. Further and looking ahead to (3) below, if - as TMD avers - the claim is bound to fail for preclusion or vexation in its chosen forum, why should it fare any better before this Court even leaving to one side the supervening accrual of a time-bar defence?

64. *Russell on Arbitration* (24th ed.) at 7-031(2) gives as an example of where an arbitration agreement is inoperative or incapable of being performed a situation where a party is precluded by an estoppel from pursuing the arbitration proceedings, citing *Hashwani v. Jivraj* [2015] EWHC 998 (Comm) at [126]-[127]. As the footnote citation records, that case did not involve a s.9 application. It appears that the effect of the relevant estoppel was to prevent the claimant (Mr Hashwani) from contending that there was any longer an extant arbitration agreement as a matter of contractual analysis. If correct, that would suggest that no s.9 stay would be brought by such a defendant in the first place or, come what may, the requirements of s.9(1) would not be met. The present case is materially different in that TMD itself has engaged this Court's jurisdiction in order to vindicate the SOA-AA and seek a declaration as to its subsistence and primacy over the parties' entire dealings at all material times.

65. TMD cannot establish any of the exceptions in s.9(4). This then leaves whatever residual discretion the Court may have to refuse a stay under s.9 where it would serve no real or proper purpose. The existence and scope of this suggested discretion has been described by Foxton J as representing a "*significant and, it is respectfully suggested, controversial development in English arbitration law*" the precise juridical basis for and practical parameters of which have yet to be explored: see *Sodzawiczny v. Smith & another* [2024] EWHC 231 (Comm); [2024] 1 Lloyd's Rep 446 at [61].

66. The present case does not necessitate any such exploration. It cannot be said that OWB's seeking of a s.9 stay is itself abusive or improper. OWB's position is that the present claim is hopeless and abusive. It seeks to have such claim expunged or extinguished at this preliminary stage. It is nevertheless entitled to insist upon any such claim being dealt with

in the contractually-agreed forum which the claim itself presupposes and positively avers, namely Malaysia-seated arbitration, where OWB confidently expects (as does TMD, as noted above) to see it rejected at the threshold stage as occurred in the AIAC Award.

67. The present case does not fall within either of the examples given in *FamilyMart* or *Mozambique* of where a stay application might lack a real or proper purpose. The issues are obviously not peripheral to the legal proceedings; on the contrary, the stay would cover the entire claim brought against OWB. Further, given that TMD is sole claimant in this action, OWB could not face the same issues in this action at the suit of another claimant. The fact that ING does not seek a s.9 stay is immaterial as a procedural proposition and especially in light of its unanswerable preclusion defence considered in (3) below.

68. Finally, it is not abusive or unconscionable for OWB both to insist upon the present claim being referred to arbitration and deny such arbitral jurisdiction on the basis of the preclusive effect of the LMAA Award or Cockerill Order or AIAC Award. According to the premise of the pleaded claim itself, OWB has an extant contractual right to insist upon that forum being the place where this particular claim, albeit time-barred, is dismissed (again) for lack of jurisdiction. At the risk of repetition, the claim itself presupposes and positively avers the subsistence and primacy of the SOA-AA.

69. In so far as this feels convoluted or awkward, it has been caused by TMD's decision to sue here in England after losing both arbitrations. There is symmetry or parity of discomfort running through the rival analyses. TMD both avers arbitral jurisdiction and denies arbitrability or operability. OWB invokes the Jurisdiction Ruling as to non-applicability of the SOA-AA and yet insists that the SOA-AA must govern any doomed claim for breach of its own terms. Schrödinger's Cat has befriended both camps.

70. Ultimately what counts against TMD is that its own pleaded claim presupposes the subsistence and primacy of the SOA-AA. If TMD wishes to exploit any contradiction in OWB's own position, insisting that OWB must take both the rough and smooth of the Jurisdiction Ruling, it can do so in any further Malaysia-seated arbitration should that be pursued in light of the AIAC Award and intervening time-bar.

71. If the matter arose for determination, I would conclude that there is no basis for refusing a stay of the claim against OWB in its entirety. From this it would follow that England is not the proper forum for such claim, hence the permission granted by Knowles J should be set aside as described in (b) above. As it happens, I do not reach a position where I could exercise such power under s.9 because of the terminal effect of my prior conclusions.

(2) Vexation by Parallel Proceedings / Stay or Strike Out

72. ING seeks to stay or strike out the pleaded claim against it on the basis that it constitutes abusive or vexatious parallel litigation by TMD in the context of the pending challenges in the Malaysian court system. In such situations, a claimant may be put to its election on pain of being struck out: see *Australia Commercial Research and Development Ltd. v. ANZ McCaughan Merchant Bank Ltd.* [1983] 2 All ER 65.

73. Whether this is properly described as a jurisdiction challenge is debatable, but characterisation does not matter for present purposes. The real point here is ING's substantive defence of preclusion addressed under (3) below. It is difficult to see how this Court's process is *additionally* abused, or ING itself is *additionally* vexed or harassed, by

the fact that this claim exists *in parallel with* the Malaysian challenges instituted by TMD. The logical premise of ING's complaint in this context is that the present claim is hopeless and abusive *irrespective of* what is occurring (at TMD's insistence) in the Malaysian courts.

74. I return to this topic under (4) below, as it seems to me to be tied into the question of whether the present claim should yield or defer to the outcome of the pending court process in Malaysia. That question features in my analysis of (3) below.

(3) Preclusion / Strike Out

75. This aspect dominated the submissions at the hearing before me. Despite extensive argument and citation and much witness evidence, I am satisfied that the answer is relatively straightforward.

76. The present claim is barred by preclusion arising from the LMAA Award and the Cockerill Order as reflected in the AIAC Award. It is, accordingly, hopeless and abusive. The only sensible solution is to strike it out in its entirety.

77. The allegation of breach of the SOA-AA is logically inconsistent with the central finding in the LMAA Award whereby the tribunal ruled that it had substantive jurisdiction notwithstanding the existence of the SOA-AA: see paragraphs 16 & 18 above. The pleaded claim assumes the opposite of the Jurisdiction Ruling.

78. Irrespective of the Cockerill Order, the LMAA Award is final and binding as between these three parties such as to have *res judicata* effect. This is the consequence of s.58(1) and s.73(2) of the 1996 Act: see *Svenska Petroleum Exploration A.B. v. Government of The Republic of Lithuania & another* [2005] EWHC 9 (Comm); [2005] Lloyd's Rep 515 at [22]-[27] (giving recognition to an interim award on jurisdiction which had been made in Copenhagen but not challenged in the Danish courts); *People's Insurance Company of China & another v. Vysanth Shipping Co. Ltd.* [2003] EWHC 1655 (Comm); [2003] 2 Lloyd's Rep 617 at [21]-[26] (refusing an extension of time under s.80(5) to bring a s.67 challenge by reference to such accrued or deemed position).

79. Section 73(2) operates as a form of statutory issue estoppel within this jurisdiction. The stated effect is framed in absolute terms, i.e. "*may not object later to the tribunal's jurisdiction on any ground which was the subject of that ruling*". It is stricter than the doctrine of issue estoppel on the face of things. No case was cited which suggested otherwise. I nevertheless consider the non-statutory requirements below, including the various points taken by TMD as to why no issue estoppel arises in the present case.

80. The principles applicable to *res judicata* are summarised by the Supreme Court in *Virgin Atlantic Airways Ltd. v. Zodiac Seats (UK) Ltd.* [2013] UKSC 46; [2014] AC 160 at [17]-[25]. I am satisfied that these requirements are met in the present case, at any rate as regards issue estoppel rather than cause of action estoppel. The crucial common issue is whether the SOA-AA conferred substantive jurisdiction upon a Malaysia-seated arbitral tribunal, and hence deprived the London-seated tribunal of any such jurisdiction, in respect of the admissible subject-matter of the London Arbitration - namely, the dispute concerning the bunker supplies in 2014. The LMAA Award contains a definitive finding on this issue by reason of TMD having invited the tribunal in London to determine it as part of a jurisdictional objection. The present action is a challenge or objection to the Jurisdiction Ruling as a matter of substance. It is substance that matters, not form.

81. TMD contends that such finding was *obiter* in light of the tribunal's finding that TMD had lost the right under s.73(1) to rely upon the SOA-AA in support of its jurisdiction challenge in the London Arbitration. I disagree. The finding was integral to the dispositive finding and declaration that "*the Tribunal has substantive jurisdiction to decide the claims made in the arbitration*". For TMD to avoid the preclusive effect of such substantive contractual finding by taking advantage of a gateway procedural finding based on its *own* conduct in that arbitral process is far from palatable. Come what may, the s.73(1) waiver finding was submitted for determination and is itself final and binding.

82. TMD further submits that the Jurisdiction Ruling was not made by applying Malaysian law to the issue, whereas the present claim for breach of the SOA-AA is likely to be governed by Malaysian law. The answer to this is two-fold: first, TMD never sought to argue that Malaysian law applied to the proper construction of the SOA-AA or suggest that such law would be any different from English law in this context; and, secondly, TMD does not plead that any of its claims are governed by Malaysian law - or identify the content of such foreign law - in the present action, instead assuming that English law of limitation applies to its claims: see paragraph 13 above.

83. More fundamentally, TMD says that it is not permissible to look only at the position in this jurisdiction. Focussing on the absence of a curial challenge here in England, including under s.66(3) pursuant to the terms of the Cockerill Order, involves just one hemisphere in a global inquiry as to the legal effect (if any) of the LMAA Award. This is TMD's central contention in resisting the strike out application.

84. In the context of international arbitration, as reflected in the scheme of the 1996 Act, an award debtor or other party who disputes arbitral jurisdiction in whole or in part may avail itself of either (and in some instances both) of its so-called 'active' or 'passive' rights of challenge. No arbitral tribunal has authority to self-certify its own jurisdiction. This depends on private consent and autonomy which can only ultimately be determined by a court with appropriate jurisdiction. The right to have such elemental matters determined in court is inalienable in the sense that a party cannot enforceably forego or compromise such right, even though it may choose not to use or exercise it (fully or otherwise) when available or may lose it through non-compliance with mandatory conditions. This accords with public policy as reflected in the scheme of the NYC and the 1996 Act in this jurisdiction: see *Minister of Finance (Incorporated) 1Malaysia Development Berhad v. International Petroleum Investment Co.* [2019] EWCA Civ 2080; [2020] 1 Lloyd's Rep 93.

85. Although 'active' and 'passive' have currency as labels amongst practitioners and academics, what they denote is a *proactive* or *offensive* challenge, on the one hand, and a *reactive* or *defensive* challenge, on the other hand. As to this distinction:

    i) The curial court has (exclusive) jurisdiction over any 'active' challenge to arbitral jurisdiction. In the 1996 Act, such challenge can be made prospectively by those with such right under s.32 (subject to s.73) or s.72 (where such party has not participated in the arbitral process); or it may be made retrospectively under s.67 or where engaged s.66(3) (in each case, subject to prescribed time limits and s.73). A jurisdiction challenge under s.66(3) is reactive and defensive to the creditor/counterparty's attempt to enforce a domestic award under s.66, although it seeks a determination about arbitral jurisdiction from the curial court. There is

some debate about the precise interplay between s.66(3) and s.67 (or s.68) challenges, but that does not matter here.

ii) A 'passive' challenge to arbitral jurisdiction occurs in the context of international enforcement of an award, most usually through the NYC. Article V(1)(a) preserves the right to challenge validity of an arbitration agreement as a ground for resisting enforcement. This is reflected in s.103(2)(b) of the 1996 Act as in arbitration legislation enacted in other contracting and signatory states. In this context 'validity' is taken to include material scope, arbitrability and whether a particular person or entity is bound by the arbitral covenant. As the Supreme Court made clear in *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763, this is an independent and inalienable right of challenge to arbitral jurisdiction before the court seised of a process seeking enforcement of a foreign award. Nothing the arbitral tribunal says can affect the court's determination; cf. issue estoppel arising from a curial court's prior determination of the same issue by application of the same system of law: *Kabab-Ji SAL v. Kout Food Group* [2021] UKSC 48; [2021] Bus LR 1717.

86. TMD's position is, therefore, that its choice not to / to not exercise any of its 'active' challenge rights in this jurisdiction cannot result in the LMAA Award, even in light of the Cockerill Order, having final determinative and preclusive effect as to the status of the SOA-AA and hence the existence of substantive jurisdiction on the part of the tribunal in the London Arbitration. In short, TMD submits, this all depends on the outcome of the pending process before the Malaysian courts where TMD is exercising - as a matter of free choice - its inalienable rights of 'passive' challenge to the LMAA Award. Such challenges are indirect rather than direct, because ING/OWB have not sought to enforce the LMAA Award in Malaysia through the NYC scheme and local arbitration statute, as noted above.

87. The answer to this contention is that the Court is here determining the fate of an action commenced before it. That was TMD's own choice, assisted by the fact that ING can be served within this jurisdiction and driven by an impending limitation guillotine. The Court is, therefore, concerned with the legal effect of the LMAA Award and/or Cockerill Order as a matter of English law. The fact that TMD has pending challenges to registration/recognition of the Cockerill Order or the validity of the AIAC Award in another jurisdiction is not relevant to this determination. I cannot see how anything said in or decided by the Court of Appeal in Malaysia on the TMD Recognition Challenge affects the *res judicata* analysis applicable in this Court.

88. As a last resort on issue estoppel, TMD submitted that the present claim falls within the so-called *Arnold* exception discussed in *Virgin Atlantic* (see above). However:

i) This exception only applies in special circumstances where an issue estoppel would cause injustice, the obvious examples being a subsequent change in the law or new material which could not with reasonable diligence have been found or used in the earlier legal process: see *Skatteforvaltningen (Danish Customs & Tax Administration) v. MCML Ltd.* [2024] EWHC 148 (Comm) at [35]-[42].

ii) I see no basis for the operation of this limited exception in the present case. TMD revealed the existence of the SOA two years after serving its defence in the London Arbitration; it had all the material to hand with which to make the points it needed

to challenge jurisdiction in that arbitration and indeed did so; it invited the tribunal to determine the scope and effect of the SOA-AA; and it was able to commence the Malaysian Arbitration within four months of the LMAA Award, alleging breach of the SOA-AA (together with tortious procurement) as now pleaded in the present action. Nothing has changed - let alone some extraneous or excusable supervening development which would mean that issue estoppel causes injustice to TMD.

iii) On the contrary and so far as relevant, it would cause injustice to ING (and OWB, if it had been validly served) for the present claim to proceed any further in light of the final and preclusive effect of the LMAA Award within this jurisdiction according to s.73(2) of the 1996 Act. This flows from TMD's own decision to eschew all of its rights of challenge to the Jurisdiction Ruling in this forum.

iv) TMD makes much of its right to have a court of law determine the underlying factual and contractual dispute on the merits. It could have vindicated that right years ago under s.32 (pre-award) or s.67 (post-award) or s.66(3) (enforcement) in this jurisdiction and/or sought some coercive remedy in Malaysia in respect of the London Arbitration. I infer that TMD chose not to do so in its own self-interest.

v) In short, the loss of an ability to pursue the present claim before this Court causes TMD no injustice and does not offend or contravene the *Dallah* principle.

89. In light of my conclusion on issue estoppel, it is not necessary to address ING's fallback position based on abuse of process. In so far as the present action constitutes a collateral attack upon or so-called 'non-compliant challenge' to the LMAA Award, this may be said to beg the issue estoppel analysis and so add nothing in practice. On any view, however, TMD's pleaded claim is anathema to the Jurisdictional Ruling whether or not there is precise correspondence or equivalence of the issues involved in each process.

90. It is not strictly necessary to consider the independent preclusive effect (if any) of the Cockerill Order or the AIAC Award.

91. For present purposes, I am content to ignore the AIAC Award: it is based on the LMAA Award and, in any event, remains subject to local curial challenge. The fact that TMD advanced the same claims as pleaded here in the Malaysian Arbitration does not alter things. The AIAC Award is, at best, corroboration from a competent and independent panel that the substance of the present claim is logically inconsistent with and antagonistic to the Jurisdiction Ruling.

92. The Cockerill Order has a different status. It formalised and reinforced the preclusive effect of the LMAA Award. The enforcement of a declaratory award - or, more accurately, an arbitral declaratory order within an award, including as to substantive jurisdiction - is permissible under s.66 of the 1996 Act. Such enforcement by court order facilitates the future invocation of preclusive doctrines such as *res judicata* within this jurisdiction and, therefore, has practical utility. This effect may depend in part upon the fact that the exercise of the Court's power under s.66 is a judicial act involving some (albeit limited) reservation of evaluative function and not "*an administrative rubber stamping*" exercise: see *West Tankers Inc. v. Allianz SpA & another (The "Front Comor")* [2012] EWCA Civ 27; [2012] Lloyd's Rep 398 at [35]-[38]; also the discussion of s.66 by Foxton J in *Sodzawiczny v. McNally* [2021] EWHC 3384 (Comm); [2022] 1 Lloyd's Rep 117 at [9]-[15].

93. In these circumstances, I conclude that the present claim is hopeless and abusive because it is precluded by the findings in the LMAA Award as enforced by and endorsed in the Cockerill Order. The fact that the same claim was brought by TMD against ING and OWB in the Malaysian Arbitration and dismissed on the same or similar preliminary basis in the AIAC Award is fortification of the inherent sense and justice of this conclusion, but not necessary for establishing it as a matter of legal analysis.

(4) Case management stay?

94. In light of my conclusions on (1) and (3) above, this procedural option does not arise. The fate of this action is not dependent on what may subsequently occur in the Malaysian court system, as explained above.

95. If I am wrong in those conclusions, however, I see the practical sense in staying the present proceedings to await the outcome of those pending challenges in Malaysia. The logic of TMD's own position on (3) above is that it must abide by the final and conclusive outcome of its 'passive' challenge(s) to the (purported) arbitral determination(s) of the underlying contractual dispute at the heart of this multi-forum saga. TMD wants its day in court. It nevertheless recognises that it can only have that in one court system, not two.

96. Rather than put TMD to its free election pursuant to (2) above, the better solution would have been to stay the present claim to await the outcome of the pending court challenges in Malaysia. TMD's open offer to stay the present claim on this basis may amount to such election in practice. As it happens, however, this eventuality does not arise in light of my conclusions on (1) and (3) above.

DISPOSAL

97. For the reasons given in this judgment and reducing the conclusions to what matters in practical terms:

    i) the Knowles Order is set aside such that the claim against OWB stands dismissed; and

    ii) the entire claim against ING (as with OWB, if it had been validly served) is struck out or dismissed on the basis that it is hopeless and abusive in light of the LMAA Award and the Cockerill Order as reflected in the AIAC Award.

98. There will be a short remote hearing to deal with matters consequential upon the formal handing down of my approved judgment, in so far as these cannot be agreed in the meantime.

99. I express my gratitude to all three advocates for their clear and concise submissions.