Neutral Citation Number: [2019] EWHC 1533 (Comm)

Case Nos: CL-2018-000613 and CL-2018-000614

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 17/06/2019

Before :

MR. JUSTICE TEARE

- -

Between :

COCKETT MARINE OIL DMCC	**Claimant**
-and-	
(1) ING BANK N.V.	**Defendants**
(2) O.W. BUNKER MALTA LIMITED	

M/V "ZIEMIA CIESZYNSKA"

AND

COCKETT MARINE OIL (ASIA) PTE LIMITED	**Claimant**
- and -	
(1) ING BANK N.V.	**Defendants**
(2) O.W. BUNKER EAST DMCC	

MV "MANIFESTO"

- -
- -

Dominic Happé (instructed by **Lewis & Co**) for the **Claimants**
Siobán Healy QC and Clara Benn (instructed by **Gibson & Co**) for the **Defendants**

Hearing dates: 11 and 12 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE TEARE

Mr. Justice Teare :

1. This a challenge to two arbitration awards pursuant to section 67 of the Arbitration Act 1996 on the grounds that the arbitral tribunal had no jurisdiction. The tribunal held that it had jurisdiction because the terms of the contract between the parties included a London arbitration clause. The Claimants on this challenge say that the terms of the contract did not include such a clause and so the tribunal lacked the requisite jurisdiction. The Defendants to this challenge seek to uphold the decision of the tribunal that the terms of the contract included a London arbitration clause. The arbitration tribunal considered the matter in comprehensive and fully reasoned awards. But the Arbitration Act 1996 permits there to be a rehearing of the issue and so this court must consider the matter afresh.

2. The claims sought in the two cases are modest. In the one case the claim was for the sum of $298,526 in respect of the supply of bunkers and in the other case the claim was for the sum of $228,000, also in respect of the supply of bunkers. The bunkers were supplied without complaint and in those circumstances it is puzzling that the Claimants on this challenge wish to incur further legal costs on the question of jurisdiction. The explanation may lie in the complications caused by the collapse of the OW Bunker Group ("OWBG"), which have already engaged the attention of the Supreme Court; see *PST Energy 7 ShippING LLC v OW Bunker Malta* [2016] UKSC 23. But there appears to be no risk of the Claimants having to bear the costs of the bunkers twice. In the one case I have been told that they have paid the actual or physical supplier of the bunkers but if they are liable to the Defendants also they have the benefit of an indemnity from the supplier. In the other case I have been told that the Defendants have paid the actual or physical supplier. Counsel for those challenging the awards had no instructions as to there being any particular commercial or business reason for incurring the costs of this challenge.

The parties

3. The parties are (or were) engaged in the supply of bunkers to ships. In the first case Cockett Marine OIL DMCC ("Cockett Dubai") purchased bunkers from OW Bunker Malta Limited ("OW Bunker Malta") for supply to the mv ZIEMIA CIESZYNSKA. OW Bunker Malta purchased the bunkers from Eko Marine Fuels. The bunkers were actually supplied to the vessel on 10 October 2014. In the second case Cockett Marine Oil (Asia) PTE Ltd. ("Cockett Asia") purchased bunkers from OW Bunker Middle East DMCC ("OW Bunker Middle East") for supply to the mv MANIFESTO. OW Bunker Middle East purchased the bunkers from GS Caltex. The bunkers were actually supplied to the ship on 11 October 2014.

The issues

4. The issues can be shortly expressed.

   i) In the first case concerning the supply of bunkers to the mv ZIEMIA CIESZYNSKA the question is whether, when the contract was made, OWBG's standard terms and conditions, which included the London arbitration clause, were part of the contract either because they were expressly incorporated or because they were incorporated by reason of a course of dealing between OW Bunker Malta and Cockett Dubai.

ii) In the second case concerning the supply of bunkers to the mv MANIFESTO the question is whether, when the contract was made, OWBG's standard terms and conditions, which included the London arbitration clause, were part of the contract because they were expressly incorporated.

iii) In both cases there is a further question, namely, whether, if the terms and conditions were incorporated, they were varied so as to exclude the London arbitration clause because the actual or physical supplier of the bunkers insisted that its terms, (which did not include a London arbitration clause), govern the contracts between the relevant OWBG entity and the relevant Cockett Marine entity.

iv) Finally, there is a question as to whether, in the event that the arbitrators had jurisdiction, Cockett Marine can challenge their finding that there was a valid assignment of OWBG's claim to ING Bank. Cockett Marine say they can because the issue goes to the arbitrator's jurisdiction to make an award against ING Bank. ING Bank and OWBG say that they cannot because the ambit of a challenge to the substantive jurisdiction of the arbitrators under the Arbitration Act 1996 does not extend to such an issue.

OWBG's 2013 Terms and Conditions

5. In 2013 OWBG altered their terms and conditions. Prior to 2011 their terms and conditions provided for Danish law and Danish arbitration. Their 2013 terms and conditions provide for English law and London arbitration. OWBG took steps to inform their customers of the change. In view of the number of customers involved they employed an independent company, Concep, to communicate with their customers, rather than perform the task themselves.

6. There was no evidence from Concep as to the steps they took to inform customers of the change in the terms and conditions. However, OWBG was able to access Concep's web page and, by use of a password, access information about the "campaign". That was the method provided by Concep to its customers to enable them to assess the success of the campaign. Evidence of the information available on the web page was given by Mr. Hansen, OWBG's IT manager. He had had no contact with Concep or with the steps taken to inform customers of the change in terms and conditions. But he was able to access the information held on Concep's web page and was familiar with the type of technology used by Concep and so could explain the significance of the information. He gave his evidence clearly and fairly. For example, he had no hesitation in accepting the limitations to the evidence he could give. When asked to explain his answers he did so willingly and with comprehensible reasons.

7. From Concep's web page it was possible for Mr. Hansen to access a copy of the pro forma email sent to the customers of OWBG in August 2013. It stated as follows:

> Please find attached OW Bunker Group Terms and Conditions of Sale for Marine Bunkers Edition 2013 being valid from and including 01.09.2013 and based on which our Group is selling to you.
>
> OW Bunker Group – Terms and Conditions.pdf.

8. The pro-forma letter was signed by Mr. Mortensen, manager of the Quality Support Department. He also gave evidence and did so with fairness, also accepting without hesitation what he could not speak about. He had not drafted the letter and could not remember it but said that he must have approved it. He explained that OWBG operated two computer systems; one, Saleslogix, which recorded traders' contacts with customers and, two, Navision, an accounts system used by the finance team.

9. The information available from Concep revealed, as explained by Mr. Hansen, that the letter of August 2013 was sent to 6,985 recipients whose email addresses were in the Saleslogix system and to 6,229 recipients whose email addresses were in the Navision system. Of the former some 2,543 recipients viewed the email, 777 clicked on the attachment and 219 bounced back. Of the latter some 2,188 recipients replied, 552 clicked on the attachment and 190 bounced back. Mr. Mortensen received no complaints from customers that they could not access the terms and conditions by clicking on the attachment. Mr. Hansen gave evidence that he had (in the course of the preparation of his evidence) clicked on a test email sent to Mr. Anders Fryst of OWBG on 30 August and it gave access to the terms and conditions.

10. The emails in fact sent to the various Cockett Marine companies are not in evidence. It would appear that they are not available on the Concep web page; otherwise Mr. Hansen would have found them. But the information from Concep indicates that the pro forma letter was sent to the email address of Cockett Dubai and Cockett Asia (the two Cockett Marine companies in these proceedings) on 30 August 2013. The "campaign history" recorded that the Cockett Dubai email address viewed the terms and conditions 22 times and that it had been clicked on twice. Another document ("Concep Send") indicated that it had been viewed 3 times on 30 August 2013. The campaign history for the Cockett Asia email address recorded that it had been viewed 6 times. Another document ("Stream") showed that a person operating the Cockett Asia email address viewed it on 2 and 3 September 2013.

11. Cockett Marine adduced evidence from the two traders involved in this case and from Cockett Marine's solicitor that the IT department of Cockett Marine had not found a copy of the August 2013 email. However, there was no witness from the IT department and no explanation of the steps taken by the IT department to search for the email in question. There is in fact evidence from the Concep web page that a person operating the email address of Mr. Fletcher, one of those traders, viewed the email on 30 August 2013. When cross-examined he accepted that he might have read the subject line of the email but not the terms and conditions themselves because that was not his role. It was the role of another department.

12. Counsel for Cockett Marine submitted that the evidence of Mr. Hansen was not reliable because he had not dealt with Concep and was not an expert on their systems. However, the documents he adduced in evidence were obtained from the Concep web page (even if not all of them expressly indicated that they came from Concep web page) and he, as OWBG's IT manager, was qualified to interrogate the campaign history, the web site being the means provided by Concep to OWBG to learn how the campaigns had fared. Moreover, he himself had clicked on the test email sent to Mr. Fryst. In any event there can be little, if any, doubt as what terms such as "viewed", "clicked" and "bounced" mean. There was no reason not to accept Mr. Hansen's evidence.

13. I am satisfied that that on the balance of probabilities OWBG's 2013 terms and conditions were brought to the attention of Cockett Marine and in particular to the two Cockett Marine companies involved in these proceedings.

14. Between September 2013 and October 2014 OWBG alleges that there was a course of dealing between OW Bunkers Malta and Cockett Dubai on the terms of the 2013 terms and conditions. No such allegation is made as to a course of dealing between OW Bunkers Middle East and Cockett Marine Asia (because, as found by the arbitrators, some of the trades involving Cockett Asia had included reference to the 2011 terms and conditions).

15. Between September 2013 and October 2014 there were 9 sales of bunkers by OW Bunkers Malta and Cockett Dubai. In each of these trades there was a formal "nomination" by Cockett Dubai, which set out the sale and requested a copy of "your latest terms and conditions". In each case there was also a "Sales Order Confirmation" from OW Bunkers Malta which stated that the order was subject to OWBG's terms and conditions "which are known to you and remain in your possession" but in case they were not a hyper link was provided so that they could be accessed from OWBG's website. In 5 of the previous trades the hyper link was in a certain form and in the remaining 4 it was in a slightly different form. Mr. Hansen, as a result of using an archive website called the "Wayback Machine", has been able to confirm that on 27 November 2014 (less than two months after the bunker supply contracts which have given rise to these proceedings) clicking on the second hyper link would take the user to the 2013 terms and conditions. He could not establish the same with regard to the first hyper link web because, he thought, the first hyper link had not been uploaded onto the web site, whilst the second had been and so could be accessed by the "Wayback Machine". Although it is possible that there was an error with the first hyper link (which might explain why it was altered) I consider it more likely than not that clicking on the first hyper link would also have taken the user to the 2013 terms and conditions. Mr. Mortensen had occasion to click on the hyper link 5-6 times a year (in the course of his work resolving disputes with customers) and that led him to the 2013 terms and conditions. He could not recall whether he had clicked on the first hyper link but if the first hyper link did not lead the customer to the 2013 terms and conditions Mr. Mortensen would probably have received complaints from customers to that effect and he did not.

16. In both cases before the court the submission by Cockett Marine is that the contracts for the supply of bunkers were not on OWBG's 2013 (or any) terms and conditions. This is of course possible but it would be a surprising conclusion to reach for several reasons. First, the unchallenged evidence of Mr. Mortensen, who has long experience of many aspects of the bunker business having worked for OWBG for over 35 years, is that generally the seller's terms and conditions apply to bunker supply contracts. The exception is where it is specially agreed that the buyer's or other special terms will apply. Second, Mr. Fletcher, the trader acting for Cockett Dubai, accepted in the arbitration that it may be usual for the seller's terms to apply at each stage of the contractual chain. Third, Cockett Marine's standard form of nomination asked for a copy of the seller's latest terms and conditions, Fourth, given the steps taken by OWBG in August 2013 to inform their customers, including Cockett Marine, that they would now be doing business on the basis of their 2013 terms and conditions, it would be surprising if they chose to do business on the basis of no terms at all.

The exchanges with regard to the supply of bunkers to mv ZIEMIA CIESZYNSKA

17. It is common ground that on 2 October 2014 OWB Malta agreed to sell and Cockett Dubai agreed to buy a quantity of fuel oil. The email exchanges began at 1238 (or 1538, depending on the time zone) and ended at 1500 (or 1800). Although there was evidence of a telephone call neither party suggests it was of any significance. The email exchanges must be assessed objectively. The subjective or internal views of those involved are not therefore relevant. The email exchanges can be summarised as follows.

    i) By an email timed at 1238 (1538) Mr. Fletcher of Cockett Dubai asked Ms. Perimenis of OWB Malta to make an offer for the supply of bunkers of a certain stated quantity and quality.

    ii) By an email timed at 1400 (1700) Ms. Perimenis offered to supply the bunkers at certain stated prices and added "Please advise soonest possible since lsfo avails are currently limited".

    iii) By an email timed at 1427 (1727) Mr. Fletcher replied, stating "Despina we confirm our order. Pls send me the agents details asap together with the calling instructions".

    iv) By an email timed at 1456 (1756) Mr. Fletcher sent an email entitled Nomination which stated: "Ref our telecom we are now able to confirm having placed the following nomination". The prices and specifications were then set out. In addition provisions relating to payment, bunker delivery receipts, sanctions and other matters were set out. At the end of the nomination it stated: "Please send us a copy of your latest terms and conditions of sale".

    v) By an email timed at 1500 (1800) OWB Malta was "pleased to confirm [the order] as per attached Sales Order Confirmation" (the "SOC"). The SOC gave details of the quantity, quality and price of the bunkers and stated that "the sale and delivery of the marine fuels" were subject to the "O.W.Bunker Group's Terms and Conditions of sale for Marine Bunkers." It was further stated that: "The acceptance of the marine bunkers by the vessel named above shall be deemed to constitute acceptance of the said general terms applicable to you as "buyer" and to OW Bunker Malta Ltd. as "seller". The fixed terms and conditions are well known to you and remain in your possession. If this is not the case, the terms can be found under the web address" which was then set out. The email further said: "Any errors or omissions in above Confirmation should be reported immediately."

18. As to when the contract was made, Cockett Marine say that the contract was concluded at 1427 (1727), before mention was made of OWBG's terms and conditions. But OWBG and ING Bank (who claim as assignees of OWBG) say that the contract was not made until 1500 (1800), alternatively on delivery of the bunkers.

19. Mr. Fletcher gave oral evidence but since neither party relied upon any oral conversations as establishing the contract his evidence did not materially advance the debate. The question of when the contract was made depends upon an objective assessment of the emails.

20. The offer made by OW Bunker Malta at 1400 (1700) was capable of acceptance. It was suggested that it was not capable of acceptance because of the words "Please advise soonest possible since lsfo avails are currently limited". However, I consider that those words are simply an encouragement to Cockett Marine not to delay in accepting the offer.

21. Cockett Dubai's response at 1427 (1727) was "we confirm our order". Those words are capable of amounting to an acceptance. But the court cannot overlook the fact that when Cockett Dubai provided their nomination at 1456 (1756) they added additional terms and requested a copy of OWBG's terms and conditions. This strongly suggests that Cockett Dubai did not regard the parties as having already reached a binding agreement. If they had done so they would not have added additional terms or sought the seller's terms and conditions. The present case therefore appears to be an example of the type of case, referred to in *Chitty on Contracts* 33rd ed. paragraph 2-028, where parties continue to negotiate after they appear to have reached agreement. In such a case the court may look at the entire course of the negotiations to decide whether an apparently unqualified acceptance did in fact conclude an agreement. In the present case I am satisfied, by reason of the terms of the nomination at 1456 (1756), that, objectively assessed, the parties had not concluded their agreement at 1427 (1727).

22. OW Bunker Malta's SOC was not an unqualified acceptance of the nomination. It added, in addition to OWBG's standard terms and conditions, a term dealing with samples. So, although expressed as a confirmation of an order, it may well have been, strictly, a counter offer. Its terms provided for acceptance of the standard terms and conditions by conduct, namely, the acceptance of the bunkers by the vessel.

23. Cockett Dubai were already aware of the 2013 terms and conditions by reason of the August 2013 email but if they were not they were able to access them by clicking on the hyper link in the SOC. As I stated in *Impala Warehousing and Logistics v Wanxiang Resources* [2015] EWHC 25 (Comm) at paragraph 16: "In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the web-site is a sufficient incorporation of the warehousing terms to be found on the web-site."

24. There were no further documentary exchanges and therefore I consider that, in circumstances where OW Bunker Malta's SOC had expressly identified the conduct which would amount to acceptance, without objection from Cockett Dubai, their counter-offer was accepted by that conduct, namely acceptance of the bunkers. It was submitted that this was an unrealistic and uncommercial conclusion to reach because Cockett Dubai would surely expect to know significantly before delivery of the bunkers that they had secured a contract for the bunkers in question, particularly in circumstances where Cockett Dubai had already committed itself to its buyer. Whilst there is some force in this submission it must also be borne in mind that OW Bunker Malta made clear that acceptance of the bunkers would amount to acceptance of the terms and conditions and that there was no objection to that.

25. I have therefore concluded that this contract for the supply of bunkers was on OWBG's 2013 standard terms and conditions. It follows that the arbitration tribunal had jurisdiction to determine the claim referred to it.

26. It is unnecessary to deal with the alternative argument based upon a course of dealing. I shall therefore deal with it as shortly as I can.

27. The test to determine whether terms have been incorporated by a course of dealing was summarised in *Balmoral Group Ltd. v Borealis* [2006] 2 Lloyd's Reports 629 by Christopher Clarke J. At paragraph 348 he said that the question is whether

> "that which each party says and does is such as to lead a reasonable person in their position to believe that those terms were to govern their legal relations".

28. At paragraph 352 he noted that in an earlier case the Court of Appeal had identified two tests:

> "(a) whether reasonable notice had been given of the forwarder's conditions and (b) what had each party by his words and conduct led the other party reasonably to believe him to be accepting."

29. After considering further authorities he said at paragraph 356 that the authorities showed two things.

> "Firstly, at any rate where parties have dealt with each other more than once or twice, it may not be critical to the incorporation of standard terms that those terms be set out in a contractual document, ie one that itself constitutes an offer or its acceptance, or even in a purported record of the contract, nor that the document containing the terms relied on has preceded the making of every contract. Secondly, the sequence of events is important. An invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late. But, if there has been no reference to rival forms, the appearance of terms on the back of every invoice and the acceptance of delivery of goods without objection may indicate acceptance of the terms."

30. These principles were adopted and applied in *SKNL (UK) Ltd v Toll Global Forwarding* [2013] 2 Lloyd's Reports 115 at paragraphs 12-13 by Cooke J. There was no suggestion before me that they did not encapsulate the present state of the law on incorporation by a course of dealing.

31. In the present case there were 9 trades between Cockett Dubai and OW Bunker Malta between September 2013 and October 2014. In each case OW Bunker Malta's Sales Order Confirmation provided that the sale and delivery of the bunkers was subject to OW Bunker's terms and conditions and provided a hyper-link which, on the balance of probabilities, directed the user of the hyper link to the 2013 terms and conditions.

32. A reasonable person viewing those trades, where there was no objection by Cockett Dubai to the trades being on the 2013 standard terms of OW Bunker, would have concluded that those terms were to govern the parties' relationship.

33. It is true that there is no evidence that in the previous 9 trades the nomination and sales order confirmation documents were contractual documents. However, for the same reason that they were contractual documents in the case of the mv ZIEMIA CIESZYNSKA, it is likely that they were in those previous 9 trades. But they do not have to be. This is not a dispute between parties' rival forms and the reference to 2013 terms and conditions in each of 9 previous sales order confirmations without objection is sufficient to indicate acceptance of those terms.

34. For these reasons I would also have held that the 2013 terms and conditions were incorporated into the 2 October 2014 trade between Cockett Dubai and OE Bunker Malta by the course of dealing between the parties since September 2013.

The exchanges with regard to the supply of bunkers to mv MANIFESTO

35. The contract for the supply of these bunkers was between Cockett Asia and OW Bunker Middle East. The trader at Cockett Asia was Mr. Shin who gave evidence. He said that in 2014 he did not use emails when trading but used the telephone or a Yahoo instant messaging service. He claimed to have a recollection of the events which led to the trade in question because it was one of the last trades before OWBG became insolvent and the one which had not been paid. Nevertheless, given the number of trades with which he dealt, it seems to me unlikely that he had a detailed recollection of this particular trade and likely that his evidence is a reconstruction of what usually happened, with the assistance of a manuscript document which he said evidenced the deal he made with OW Bunker Middle East and the deal he made with his purchaser.

36. The manuscript document is entitled CMOK Enquiry/Order sheet. Mr. Shin said that it was prepared by Mr. Kang, his colleague, on his instructions. It bears the date 2 October and identifies the vessel in question as the mv MANIFESTO. The contact is identified as Mr. Coffey and the supplier is identified as OW Bunkers. The agreed price is set out, as is the price which Cockett Asia was to sell on the product. It therefore supports Mr. Shin's evidence that on 2 October 2013 he:

    i) received an enquiry from Mr. Coffey for a quotation for the supply of bunkers to mv MANIFESTO;

    ii) obtained a quotation from or on behalf of OW Bunker Middle East;

    iii) agreed a slightly higher price with Mr. Coffey to reflect Cockett Asia's commission; and

    iv) accepted OW Bunker's quotation.

37. Mr. Shin said that there was no reference made to any terms and conditions. However, on 6 and 7 October 2013 there followed an exchange of a nomination and a sales order confirmation in the same terms as with the other trade to which these proceedings relate. Thus on 6 October Mr. Kang on behalf of Cockett Asia sent to OW Bunkers a nomination which included terms dealing with payment, bunker delivery sheets and sanctions and requested a copy of the seller's latest terms and conditions and on 7 October 2013 OW Bunker Middle East sent its Sales Order Confirmation which referred to a term relating to samples and to its terms and conditions with a hyper link to the 2013 terms and conditions.

38. The exchanges on 2, 6 and 7 October 2013 must be considered together and objectively. For the same reasons which I have given in relation to the other trade I consider that the parties continued their negotiations on 6 and 7 October 2013 and that OW Bunkers' 2013 terms and conditions were accepted by conduct, namely, the acceptance of the bunkers. It follows that the arbitrators had jurisdiction to determine this claim also.

The suggested variation

39. Clause L4 of the 2013 terms and conditions provided as follows:

> "(a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.
>
> (b) Without prejudice or limitation to the generality of the foregoing, in the event that the third party terms include:
>
> .....
>
> (iii) A different law and/or forum section for dispute to be determined then such law selection and/or forum shall be incorporated into these terms and conditions.
>
> (c) It is acknowledged and agreed that the buyer shall not have any rights against the Seller which are greater or more extensive than the rights of the supplier against the aforesaid Third Party.

40. In the case of the mv ZIEMIA CIESZYNSKA the bunkers were physically supplied by Eko Marine Fuels whose terms provided, in effect, for Greek law and jurisdiction. Clause 1 stated that:

> "These general terms and conditions of contract for Marine Fuel ("GTS") shall apply to all such sales of marine fuel.
>
> Unless otherwise agreed in writing between Seller and Buyer, these GTC, which supersede any earlier GTC issued by Seller, shall override any terms and conditions stipulated, incorporated or referred to by Buyer whether in its order or elsewhere."

41. The question raised is whether the effect of clause L4 is to vary OWBG's 2013 terms and conditions by incorporating the provision in Eko's terms for Greek law and jurisdiction.

42. In my judgment there is no such variation. The aim of clause L4, where the bunkers are supplied by a third party and the third party insists that the Buyer, that is, the party who orders bunkers from OWBG, should "also" be bound by the terms and conditions of the third party, is that the terms and conditions of OWBG should be "varied accordingly". In the present case the third party supplier is Eko. It is true that its terms and conditions

provide, in effect, for Greek law and jurisdiction but there is no evidence that it has insisted that the person who has ordered bunkers from its Buyer must "also" be bound by Eko's terms. Eko has only insisted that OW Bunkers be bound by its terms.

43. Counsel for Cockett Marine did not accept this analysis. He submitted that the reference to "Buyer" in clause L4 was to "the third party supplier's buyer". That person is OW Bunkers. I am unable to accept that submission. First, the terms and conditions unsurprisingly define the Seller as OW Bunkers and the Buyer as meaning, inter alios, the party ordering the bunkers. Second, it would therefore be extremely odd for "the Buyer" in clause L4 to mean OW Bunkers.

44. Counsel sought to support his construction by saying that it enables OWBG's position with regard to its purchase and on-sale contracts to be back to back with the third party's terms and conditions and that the alternative construction made no commercial sense. Again, I am unable to accept that submssion. The object of clause L4 is not to enable OWBG's position to be back to back with the third party's terms and conditions. If that had been the intention of OWBG they would not have needed to have their own terms and conditions at all. Rather, the commercial object of clause L4 was, in those circumstances where OWBG's third party supplier had insisted that its terms should apply not only to OW Bunkers but also to OW Bunkers' buyer, to provide a mechanism by which OW Bunkers could give effect to that which its third party supplier insisted upon.

45. Clause L4(c) provides for a form of back to back protection but only, in my judgment, where there has been the requisite "insistence" referred to in clause L4(a).

46. I therefore do not consider that there has been any variation of the London arbitration clause in the contract between Cockett Dubai and OW Bunker Malta.

47. Nor do I consider that there has been any variation of the London arbitration clause in the contract between Cockett Asia and OW Bunker Middle East. In that case the third party supplier was GS Caltex. The latter's terms and conditions provided as follows:

> "Unless otherwise agreed to in writing, the following terms and conditions shall be applied to all sales of marine fuels between GS-Caltex Corporation (hereinafter "Seller") and any Buyer of marine fuels (hereinafter "Buyer")."

48. As with Eko's terms and conditions this does not amount to an insistence that the terms of GS Caltex shall apply not only to the buyer from it, namely, OW Bunkers, but also to the buyer from OW Bunkers. Furthermore, the terms of GS Caltex do not contain a law and jurisdiction clause. There is therefore nothing by which the English law and London arbitration clause in OWBG's terms and conditions could be "varied accordingly".

The assignment issue

49. Before the arbitrators there was a dispute as to whether an assignment in favour of ING Bank was effective to transfer OWBG's cause of action under the two contracts in question to ING Bank. The tribunal held that it was. Cockett Marine says that that

decision was wrong and that ING Bank was therefore not party to the arbitration agreement.

50. Counsel for ING Bank and OWBG submitted that it was not open to Cockett Marine to take this point on a section 67 challenge to the jurisdiction of the arbitrators.

51. This point only arises if Cockett Marine fail on their earlier points and the court holds, as it has done, that the two contracts in question contained a London arbitration clause so that the arbitrators had jurisdiction to make an award pursuant to that clause.

52. A party to arbitral proceedings may challenge an award of the arbitral tribunal as to its substantive jurisdiction; see section 67 of the 1996 Act. "Substantive jurisdiction" is defined by section 30 of the 1996 Act (unless otherwise agreed) as encompassing the following questions

> "(a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

53. The challenge in the present case does not concern (b) or (c) above. The question is whether it concerns (a). The phrase "a valid arbitration agreement" must mean, in its context, an arbitration agreement which is valid, that is, one which effectively refers to arbitration the claim which the claimant wishes to bring against the defendant. Where the arbitration agreement is contained within a contract and a person who claims to be an assignee of that contract wishes to arbitrate a claim under that contract the arbitration agreement will only be valid, as between the putative claimant and the defendant, if the alleged assignment is valid and effective. That would suggest that in the present case, even assuming that the bunker supply contracts contained a London arbitration clause, there was an issue as to whether, as between ING Bank and Cockett Marine, there was a valid arbitration agreement.

54. Counsel for ING Bank and OWBG submitted that this analysis was wrong and that the only question within the substantive jurisdiction of the arbitrator was whether there was a valid arbitration agreement within the bunker supply contracts.

55. In support of that proposition reliance was placed on the decision of Cooke J. in *A v B* [2017] 1 Lloyd's Reports 1. In that case a party to a contract ("A") which contained a London arbitration clause merged with another entity ("B") and ceased to exist pursuant to a Scheme of Amalgamation ordered by the Bombay High Court. All of A's assets and outstanding actions were to be continued by B. B applied to the arbitration tribunal to be substituted as claimant in the arbitration. The tribunal permitted the substitution and awarded a sum of money to it. The other party ("C") challenged the award on the grounds that the arbitral tribunal lacked jurisdiction to permit the substitution. The argument was that the arbitration had lapsed by reason of the dissolution of A and that there had been no valid notice of assignment before that happened.

56. This argument failed. As a matter of Indian law the Indian courts were bound to accept the effect of the Scheme and to substitute B for A. An Indian arbitral tribunal would be

equally bound; see paragraphs 40-41. The substance of the Scheme had the primary effect of universal succession. It was not an equitable assignment; see paragraphs 44-45. The arbitral tribunal was bound to recognise the effect of the scheme; see paragraph 48.

57. A fresh argument was raised before the court, namely, that the tribunal lacked the jurisdiction or power to substitute B for A; see paragraph 55. The court held that this was a new ground of objection which C was precluded from taking by reason of section 73 of the 1996 Act; see paragraphs 62-63.

58. Cooke J. added that the objection could not properly be made under section 67; see paragraph 64. This was "for reasons already given". Those reasons were set out in paragraphs 56 and 57 where the judge set out section 30 of the Act and said:

> "The current challenge is not based upon any decision by the tribunal in any of those three respects and cannot therefore fall within section 67."

59. This is the passage upon which counsel for OWBG relies in the present case. But it is clear that "the current challenge" was the new argument that the tribunal lacked power to order substitution. That was not within sections 30 or 67 of the Act. The court did not say that, where the arbitration agreement is contained within a contract and a person who claims to be an assignee of that contract wishes to arbitrate a claim under that contract, the question whether there was a valid assignment is not a dispute as to whether there is a valid arbitration agreement within the meaning of sections 30 and 67 of the 1996 Act. In my judgment such a question is a question whether there is a valid arbitration agreement.

60. It is therefore necessary to consider the question whether ING Bank was an assignee of OWBG's rights under the bunker supply contracts. The argument was one of construction of the Omnibus Security Agreement entered into by ING Bank and OWBG on 19 December 2013.

61. On the same date the parties had entered into a credit facility by which ING Bank made US$700 million available to OWBG. The security for the facility was contained in the Omnibus Security Agreement. Clause 2(3)(a) provided for the assignment to ING Bank of all of OWBG's "rights, title and interest in respect of the Supply Receivables." The Supply Receivables were defined as "any amount owing, or to be owed, ...under any Supply Contract." "Supply Contract" was defined "any one-time contract .....relating to the sale of oil products traded by the Group".

62. When OWBG filed for bankruptcy in November 2014 the security became enforceable. No question was raised before me as to the adequacy of the notice of assignment provided by ING Bank to Cockett Marine.

63. The submission made was that, in circumstances where it has been held by the Supreme Court that OWBG's supply contracts were not contracts for the sale of goods within the meaning of the Sale of Goods Act (see *PST Energy 7 Shipping LLC v OW Bunker Malta* [2016] UKSC 23), the assignment cannot have been effective because the assignment applied only to contracts "relating to the sale of oil products traded by the Group".

64. This submission has the attraction of beguiling simplicity. However, if it is correct it would mean that ING Bank had no security attaching the sums due to OWBG under its many bunker supply contracts, which would be surprising. The answer to the submission is that the parties to the Omnibus Security Agreement assumed that OWBG's supply contracts were contracts of sale and intended that the security provisions of the contract applied to them. The same assumption is to be found in OWBG's standard terms and conditions; see the observation of Males J. at first instance in *PST Energy 7 Shipping LLC v OW Bunker Malta* [2015] 2 Lloyd's Reports 563 at paragraph 23 and also the observations of Moore-Bick LJ. in the Court of Appeal in *PST Energy 7 Shipping LLC v OW Bunker Malta* [2016] 2 WLR 1072 at paragraphs 14 and 17. There is nothing incongruous in the parties to the Omnibus Security Agreement describing OW Bunkers' supply contracts as contracts of sale; cf Moore-Bick LJ's comment at paragraph 33. That comment was endorsed by Longmore LJ who said at paragraph 44 that there can be agreements which "may .....be described in commercial terms as contracts for the sale of goods but are contracts to which the 1979 Act does not apply."

65. Thus in my judgment the parties to the Omnibus Security Agreement described OWBG's supply contracts as contracts "relating to the sale of oil products" because in commercial terms they had many of the features or characteristics of a sale, notwithstanding that they were not contracts of sale within the meaning of the Sale of Goods Act because they did not envisage the passing of property before payment was due.

66. There being a valid assignment in favour of ING Bank there was a valid arbitration agreement between ING Bank and Cockett Marine. It follows that the arbitrators had jurisdiction to make an award in favour of ING Bank.

67. For all these reasons the challenge to the jurisdiction of the arbitrators must be dismissed.