IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 99

Civil Appeal No 19 of 2021

Between

Batavia EXIMP & Contracting (S) Pte Ltd

… *Appellant*

And

Owner of the vessels *New Breeze* & 9 Ors

… *Respondent*

GROUNDS OF DECISION

[Arbitration] — [Stays] — [Conditional Stays] — [When conditions imposed]
[Admiralty and Shipping] — [Bills of lading]

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The "Navios Koyo"

[2021] SGCA 99

Court of Appeal — Civil Appeal No 19 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
13 October 2021

27 October 2021

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 Consistent with the principle of party autonomy, where parties have contractually agreed that their disputes are to be decided by arbitration, it is axiomatic that *all* disputes arising out of that particular contract are to be determined by the arbitration. In essence, this appeal sought to challenge the conventional wisdom of this proposition.

2 The appellant commenced an admiralty action against the respondent in respect of claims under several bills of lading. On the face of the bills of lading, the terms of a relevant charterparty including an *arbitration clause* were incorporated. However, the appellant, for reasons best known to itself, failed to take steps to ascertain the full details of the incorporated terms. By the time the appellant asked the respondent for a copy of the incorporated charterparty, it was the very night before a time bar accrued to bar claims under the bills of lading.

3 Predictably, the respondent applied for and successfully obtained an unconditional stay of the proceedings under s 6(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") in favour of arbitration. The core issue in this appeal was whether the stay should be granted unconditionally or be made conditional upon a waiver of the time bar defence. This gave rise to an interesting issue as to whether a court in staying court proceedings in favour of arbitration can impose conditions such that *substantive* issues which would otherwise be decided in the arbitration can effectively be excluded from the arbitration in the exercise of the court's discretion to impose "such terms and conditions as it may think fit".

4 We heard and dismissed the appeal on 13 October 2021 with brief grounds. We were not satisfied that such a condition should be imposed. The appellant had failed to protect its own commercial interests, and could not expect the Court to insulate it from the consequences of its own actions or inaction. More fundamentally, the Court would be exceedingly slow to carve-out substantive defences, such as a defence of time bar, from the jurisdiction of the arbitral tribunal. This was all the more so given that it was not in contention that this dispute ought properly to have proceeded to arbitration *from the very outset*. It was thus not open to the appellant to seek the court's assistance to exclude defences or issues which the arbitral tribunal was entitled to determine, given the terms of the bills of lading.

5 In our detailed grounds below, we have set out the applicable test for the imposition of conditions with impact on substantive issues which ought properly to be adjudicated by the arbitral tribunal. In addition, there was also some uncertainty as to whether the quantum of a potentially time-barred claim in the arbitration can legitimately be relied upon as a proxy to determine the

extent of "undue hardship" in assessing whether a waiver of a time bar defence should be imposed as a condition for the stay. As we have explained below, the quantum of any potentially time-barred claim is irrelevant in the exercise of the court's discretion in staying court proceedings which were commenced in breach of an arbitration agreement.

The Relevant Facts

Factual Background

6 On 25 July 2019, the appellant entered into a Memorandum of Understanding ("MOU") with Amrose Singapore Pte Ltd ("Amrose") for the financing of Amrose's purchase of New Zealand pine logs. Under this MOU, the appellant would procure its financier, the Bank of Baroda, to issue letters of credit to Amrose's supplier, TPT Forests Limited ("TPT Forests"), for shipments of New Zealand pine logs from New Zealand to India on board the MV *Taikoo Brilliance*. In return, Amrose would repay the appellant with interest. The MOU included the following terms which were relevant to the present proceedings:

> IRRESPECTIVE OF AMROSE's EARLIER ARRANGEMENT WITH THE SHIPPING CO & AMROSE'S SUPPLIER, AMROSE SHALL ENSURE & HEREBY GUARANTEES TO [the appellant] THAT **NO DELIVERY OF ANY CARGO RELATED TO [the appellant's] DOCUMENTS [DIRECT PAYMENT &/OR ESTABLISHED L/Cs'] (PARTIAL OR FULL) WILL BE MADE TO ANYBODY (BUYERS OR ON AMROSE ACCOUNT) @ DISPORT – WITHOUT THEY FIRST PAYING [the appellant] IN FULL AS PER THIS MOU TERMS** [*sic*]
>
> [Emphasis added in bold, original emphasis omitted]

7 Pursuant to the MOU, the appellant procured the Bank of Baroda to issue letters of credit to TPT Forests. It was not in dispute that a total cargo of 36,934,231 JAS CBM of New Zealand pine logs (the "Cargo") was loaded on

board the *Taikoo Brilliance*. The carriage of this cargo was made pursuant to four bills of lading (collectively, the "Bills of Lading"). It was also not in contention that following the Bank of Baroda's issuance of letters of credit to TPT Forests, TPT Forests endorsed the Bills of Lading to the order of the Bank of Baroda. The Bank of Baroda in turn endorsed the Bills of Lading to the order of the appellant. The appellant received the Bills of Lading from the Bank of Baroda on or about 12 September 2019. The salient portions of the Bills of Lading were threefold:

(a) First, on the face of each of the Bills of Lading, there was a clear statement that "Freight [was] payable as per CHARTER PARTY dated 03/07/2019" (emphasis original);

(b) Second, on the reverse side of the Bills of Lading, the very first clause under the heading "Conditions of Carriage" read "All terms and conditions, liberties and exceptions of the **Charter Party, dated as overleaf, including the Law and Arbitration Clause** are herewith incorporated" (emphasis added); and

(c) Third, in the upper left-hand corner of the reverse of the Bills of Lading, there was a specific addition as follows:

> **BILL OF LADING**
> TO BE USED WITH CHARTER-PARTIES
> CODE NAME: 'CONGENBILL'
> EDITION 1994

8 On 15 September 2019, the *Taikoo Brilliance* entered Kandla Port, India, and commenced discharge of the Cargo. It was not disputed that the

discharge of the cargo was completed, at the latest, by 23 September 2019. The *Taikoo Brilliance* departed from Kandla Port that day.

The Admiralty Actions

9 On 18 August 2020, the appellant commenced HC/ADM 206/2020, HC/ADM 207/2020, and HC/ADM 208/2020 (collectively, the "Admiralty Actions") against the respondent. In particular, the appellant alleged that it had not been informed about the discharge of the Cargo from the *Taikoo Brilliance* despite having been identified as the notify party under the Bills of Lading. The appellant also argued that the respondent, as the carrier and/or the party in physical possession of the Cargo, had failed to only deliver the Cargo as demanded, upon presentation of the Bills of Lading, and/or to the order of the appellant. In short, the appellant objected to the Cargo, which was its security for the loans extended to Amrose, having been discharged, allegedly without its knowledge.

10 We noted that the appellant had split up its claim under the different bills of lading in order to obtain maximum security for its claim. The individual bills of lading corresponded to the Admiralty Actions as follows:

(a) Bill of lading CHVWTABR190501 in HC/ADM 206/2020;

(b) Bill of lading CHVWTABR190503 in HC/ADM 207/2020; and

(c) Bills of lading CHVWTABR190502 and CHVWTABR190504 in HC/ADM 208/2020.

Barring the numbering of the Bills of Lading and the quantities of cargo stated thereon, the facts of each of the Admiralty Actions were entirely similar.

11 Following the commencement of the Admiralty Actions on 18 August 2020, the appellant sought and procured an order for the arrest of the *Navios Koyo*, another vessel owned by the respondent but unconnected with the events set out above. Subsequent to the arrest of the *Navios Koyo* on 18 September, the following developments occurred:

(a) On 18 September 2020 (Friday), the Protection and Indemnity Insurance Club (the "P&I Club") for the *Taikoo Brilliance*, The North of England P&I Association Limited, wrote to the appellant's solicitors acknowledging that the *Navios Koyo* had been arrested in relation to the Admiralty Actions and seeking the details and documents supporting those actions.

(b) On 19 September 2020 (Saturday), the appellant's solicitors replied, enclosing the Writ and Warrant of Arrest. The supporting affidavit was also provided. The appellant's solicitors sought the provision of security in the sum of approximately US$5,264,000.

(c) On 23 September 2020 (Wednesday) at 6.36pm, solicitors for the time charterer of the *Taikoo Brilliance*, The China Navigation Co ("China Navigation") wrote to the appellant's solicitors, seeking confirmation on the sum of security sought for the release of the *Navios Koyo*. This email stated that:

> […]
>
> We are taking instructions on the provision of security and will respond shortly. That said, please note that the charterparty which the material bills of lading refer to contain a reference to arbitration in London. Please confirm that, upon provision of satisfactory security, your clients will release the vessel and discontinue the proceedings in Singapore.

> Our client's rights are reserved.

(d) The same day at 7.13pm, the appellant's solicitors replied as follows:

> […]
>
> We are presently taking instructions on the matters raised in your email and would be grateful if you could send across a copy of the charterparty you have referred to.
>
> […]

(e) On 24 September 2020 (Thursday) at 9.08am, China Navigation's solicitors replied, as follows:

> […]
>
> As requested, we attach the charterparty dated 3 July 2019 together with the proforma charterparty referred to in it. Please note clause 60 of the rider clauses provides for London arbitration.
>
> We also attach a draft LOU which will be provided by The Standard Club UK Ltd. Further to your suggestion on jurisdiction, please note that it provides for 'a competent court or arbitration tribunal' and provides for the full sum that has been demanded as security by your clients in their e-mail dated 19 September 2020 which was attached to our e-mail to you yesterday.
>
> Please confirm that, if the LOU is acceptable, your clients will procure the immediate release of the vessel in ADM207/2020 upon your sighting of a scan of the engrossed LOU. The original LOU shall be delivered to your offices as soon as practicable (please confirm that your offices are open to receive document deliveries) thereafter. Please also confirm that your clients will discontinue ADM207/2020 as soon as is practicable as well.
>
> […]

Following the provision of the relevant security, a further order was made on 25 September 2020 releasing the vessel. However, the Admiralty Actions were not discontinued.

The Stay Applications

12 On 6 November, the respondent took out summonses to stay the Admiralty Actions in favour of arbitration on the basis that there was an arbitration clause which had been incorporated into the Bills of Lading. In particular, the respondent explained as follows:

> (a) Clause 1 of the Conditions of Carriage of the Bills of Lading specifically incorporated all the terms and conditions of a "Charter Party". The "Charter Party" in question was referred to on the first page of the Bills of Lading, namely the "CHARTER PARTY dated 03/07/2019". This charterparty in turn referred to the voyage charterparty entered into by China Navigation and TPT Shipping Limited ("TPT Shipping") on 3 July 2019. By way of clarification, the *Taikoo Brilliance* had been on time charter from the respondent to China Navigation at all material times, and China Navigation, as head charterer, had sub-chartered the vessel to TPT Shipping by way of a voyage charterparty dated 3 July 2019 (the "Voyage Charterparty"). It was this Voyage Charterparty which had been specifically incorporated into the Bills of Lading.
>
> (b) The Voyage Charterparty consisted of a fixture recap, which stated that the "Charter Party" would be "as per the Nord Vancouver-CNCo / TPT charter party dated 05 June 2013, with logical amendments as per main terms agreed".

(c) Clause 31 of the Nord Vancouver-CNCo / TPT Charter Party expressly provided that cl 60 of the Rider Clauses would supersede cl 31 as the arbitration clause of the Charter Party. Clause 60 of the Rider Clauses provided as follows:

> Clause 60 ARBITRATION
>
> Any dispute arising from or in connection with this Charter Party shall be referred to arbitration in London. In the event of such dispute, the parties shall endeavour to agree on the choice of a sole arbitrator or, failing agreement on the appointment of such an arbitrator within 14 days of one party calling on the other to do so, such sole arbitrator shall be appointed by the London Maritime Arbitrators Association. The decision of the sole arbitrator shall be final and binding.

(d) Clause 61 of the Rider Clauses also expressly provided that the governing law of the charterparty was to be English Law.

(e) On the basis of the foregoing, the respondent argued that the arbitration clause set out at cl 60 of the Rider Clauses to the Nord Vancouver-CNCo / TPT charterparty (the "arbitration clause") was incorporated into the Bills of Lading, such that the entirety of the disputes arising out of the Bills of Lading ought to have been referred to arbitration in London. Accordingly, the respondent sought to rely on s 6(1) of the IAA and the principles set out in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 to argue for a stay.

13 The appellant, on its part, argued that (a) there was no "dispute" within the meaning of the arbitration clause to be referred to arbitration in London; and that (b) even if the Court was minded to order a stay, any such stay should be conditional on the respondent waiving any defence of time bar it might seek to

rely on in the arbitration. In relation to the condition sought, the appellant pointed to cll 2(a) and 2(b) of the Bills of Lading, which appeared to incorporate the Hague and Hague-Visby Rules, as well as to the fact that article III r 6 of the Hague-Visby Rules provides that:

> […]
>
> Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

The appellant indicated that it was prepared to accept, for the purposes of these proceedings, that since the Cargo had been delivered by 23 September 2019, its claims made after 23 September 2020 would be time-barred. However, it argued that it had "done all that was reasonable in the circumstances to protect [its] position in light of the upcoming time bar", and that the grant of an unconditional stay would cause undue and disproportionate hardship to it.

14 The Assistant Registrar ("AR") heard the application on 9 December 2020 and reserved his decision. On 17 December 2020, the AR issued his decision and granted an unconditional stay. Dissatisfied, the appellant appealed on 21 December 2020. We note for completeness that on 22 December 2020, the appellant commenced arbitration against the respondent in London in relation to the Bills of Lading.

15 On appeal before the Judge below (the "Judge"), the appellant abandoned its argument that the instant facts did not disclose a dispute within the meaning of the arbitration clause. Instead, its arguments focussed on the point that the stay granted ought to have been conditional on the respondent

waiving any defence of time bar it might have at the arbitration. Broadly, the appellant re-hashed the same arguments it had raised before the AR. As summarised by the Judge at [23] of his Grounds of Decision ("the GD"), the appellant's arguments were as follows:

(a) It had done all that was reasonable in the circumstances to protect its position;

(b) The respondent's conduct after the arrest of the *Navios Koyo* demonstrated an intention to withhold information from the appellant such that the appellant's claims became time-barred; and

(c) The grant of an unconditional stay would cause undue and disproportionate hardship to it.

16 The respondent, in contrast, aligned its position with the reasoning of the AR and adopted the following arguments:

(a) Despite the appellant having been, on its own evidence, in possession of the Bills of Lading from *12 September 2019*, the appellant took no steps *whatsoever* to ascertain the contractual terms governing the Bills of Lading until near the end of the limitation period. The Bills of Lading were clear on their face, and from the very first clause of the Conditions of Carriage overleaf, that they incorporated an arbitration clause. Yet, the appellant made no attempt to find out *anything* about this clause from the respondent until *September 2020*.

(b) While the appellant had indicated at [15] of its supporting affidavit for the arrest of the *Navios Koyo* on 18 September 2020 that it did not "have a copy of any such charterparty", nor was it "aware of the

terms of any such charterparty", there was no obligation on the respondent to provide such a charterparty, or to second-guess the reasons as to why the appellant might not have the charterparty in question.

17 The Judge heard the parties on 15 March 2021 and dismissed the appeals against the AR's decision. The salient points of the Judge's reasoning were as follows:

(a) First, the Judge rejected the appellant's argument that it had done all that it could reasonably be expected to do. The appellant had had ample time to obtain a copy of the charterparty, having received the Bills of Lading on or about 12 September 2019. Yet, it did not even *try* to obtain a copy of the charterparty until sometime in July/August 2020, when it allegedly asked Amrose for a copy of the same. More will be said below about this purported attempt to obtain the charterparty from Amrose.

(b) Second, the Judge rejected the appellant's argument that there was ambiguity as to the relevant arbitration agreement.

(c) Third, the Judge held that there was no evidence of impropriety on the respondent's part in not having drawn the appellant's attention to the existence of the arbitration clause.

(d) Finally, the Judge rejected the appellant's suggestion that its high-value claim meant that permitting a time bar to apply would cause it "undue and disproportionate hardship".

18 In the Appellant's Case, the appellant made two broad arguments:

(a) First, it argued that the Judge had erred in holding that the appellant's inaction between September 2019 and July/August 2020 "was unreasonable as [the appellant] should have taken steps to ascertain the terms of the Bills of Lading". The appellant claimed that "this presumes that there is a duty, or an expectation, on the part of the lawful holder of the Bills of Lading to ascertain the terms of the Bills of lading which are held as security as soon as he comes into possession of the same". It was further asserted that the imposition of such a duty would create an onerous obligation on trade financing banks.

(b) Second, the appellant argued that the Judge failed to take into account the "undue and disproportionate hardship that would result if [its] claims were time-barred", claiming that the Judge's dismissal of this factor as being of little weight went "against the weight of judicial authority" given the quantum of its potential loss (*ie* US$4,419,833.61).

Cumulatively, the appellant argued that it could not be faulted for its failure to commence arbitration proceedings in time. Even if it could be faulted, it was contended that the undue and disproportionate hardship that would arise on account of the quantum of its claim was a relevant factor in the exercise of the Court's discretion. It was noteworthy that the appellant abandoned any suggestion that the respondent's behaviour had been wrongful or blameworthy in its arguments before us (see [17(c)] above).

Analysis

19 The issue in this appeal was a very limited one given that the appellant had abandoned its initial objection to a stay being granted and acknowledged that its claims were in fact subject to a valid arbitration clause. The only issue

before this Court was thus whether the stay should be unconditional, or if it should be conditional on the respondent waiving its right to rely on a defence of time bar in the London arbitration.

The Incorporation of the Arbitration Clause

20 The starting point of our analysis was that it was clear from the very outset that any claims under the Bills of Lading would be subject to arbitration. The Bills of Lading were dated 6 and 12 August 2019, and, as outlined above, categorically stated that "[a]ll terms and conditions … of the Charter Party, dated as overleaf, *including the Law and Arbitration Clause* are herewith incorporated" (emphasis added). The charterparty referred to was specifically identified as the charterparty dated 3 July 2019. It was the appellant's own case that it received the Bills of Lading from the Bank of Baroda on or about 12 September 2019, and it must therefore have been aware, from 12 September 2019, that *any* claims under the Bills of Lading would be subject to arbitration.

21 In fact, it appeared to us that the reason why the incorporation clause was drafted to make direct reference to the arbitration clause was due to a body of caselaw that a clause merely purporting to incorporate the terms of a charterparty without express reference to the arbitration clause may *not* be sufficient to incorporate the arbitration clause. In particular, Males J (as he then was) observed in *The Channel Ranger* [2014] 1 Lloyd's Rep 337 at [38] that "… general words of incorporation (however wide, and whether or not including the word 'whatsoever') will not be effective to incorporate an arbitration (or jurisdiction) clause because such clauses are 'ancillary' to the main contract to which they relate, but that specific reference to an arbitration (or jurisdiction) clause will be effective". This observation was upheld by the

English Court of Appeal on appeal in *The Channel Ranger* [2015] 1 Lloyd's Rep 256 at [12], and represents a stream of authority dating back to *T W Thomas & Co v Portsea Steamship Co Ltd* [1912] AC 1 at 7. This Court adopted a similar position in *Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1996] 2 SLR(R) 196 at [28]. In this case, the Bills of Lading made *express* reference to the arbitration clause in the Conditions of Carriage overleaf.

22 Whatever the reason for the precise wording of the incorporation clause, the fact that the appellant was well aware that the charterparty's terms had been incorporated into the Bill of Lading was evident from its subsequent conduct. In the appellant's affidavit in support of the warrant of arrest of the *Navios Koyo*, the appellant specifically sought to distance itself from the terms of the applicable charterparty by stating that it "d[id] not have a copy of the [charterparty referred to in the Bills of Lading]", and that it was not "aware of the terms of any such charterparty". However, from this very statement, it was in fact clear that the appellant was well aware that the terms of the relevant charterparty *had* been incorporated into the Bills of Lading. All that the appellant was stating was that it was not aware of the *precise* terms which had been incorporated. However, that was the consequence of the appellant's own conduct in not asking for a copy of the charterparty earlier.

23 The appellant's attempt to rely on its ignorance of the terms of the incorporated charterparty does not, without more, prevent the appellant, as the holder of the Bills of Lading, from being bound by the charterparty's terms. This was all the more so in this case because on the face of the incorporation clause, the appellant was *immediately* alerted to the fact that there was an arbitration clause in the relevant charterparty. It appeared to us that it might well

explain the reason why the appellant had, correctly in our view, abandoned its attempts to contest the stay order.

The Power of the Court to Impose Conditions on a Stay

24 The power of the Court to impose conditions for a stay granted under s 6(1) of the IAA stems from s 6(2) of the said Act, which provides as follows:

> **Enforcement of international arbitration agreement**
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

25 A survey of the caselaw showed that s 6(2) of the IAA has been relied on for the imposition of a whole range of conditions:

(a) In *The Xanadu* [1997] 3 SLR(R) 360 ("*The Xanadu*") and *The Duden* [2008] 4 SLR(R) 984 ("*The Duden*"), the condition imposed was that any defence of time bar be waived.

(b) By contrast, in *Splosna Plovba International Shipping and Chartering d o o v Adria Orient Line Pte Ltd* [1998] SGHC 289, one of the conditions which the Court ultimately imposed was that security of US$50,000 be provided for arbitration in London.

(c) Similarly, in *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd and another suit* [2017] 4 SLR 182 ("*KVC Rice*"), the condition imposed was that the defendant was not to raise objections to the jurisdiction of the President of the Singapore International

> Arbitration Centre to appoint an arbitrator if parties proved unable to reach agreement on the appointment of an arbitrator.

26 It is readily apparent from the above cases that there exists a broad range of conditions which might be imposed. In our view, whether the Court's discretion to impose a condition ought to be exercised depends on the true nature of the condition(s) sought, in the context of the relevant circumstances.

27 In the present circumstances, the condition which the appellant sought to impose was a waiver of an *accrued* defence of time bar. This condition was markedly different from administrative conditions such as imposing a timeline to commence arbitration, requiring a party to appoint a solicitor to accept service, or ordering parties not to frustrate the appointment of the tribunal. Such conditions were essentially orders *consequential upon* the stay order, and sought to give effect to the arbitration agreement. They did not purport to decide any substantive issue which was rightly reserved to the arbitration. By contrast, the question of whether a party is entitled to rely on a time bar is typically an issue which rightly should be determined in the arbitration. The *nature* of the condition sought in the present case was thus significant – as was observed in *The Titan Unity* [2013] SGHCR 28 ("*The Titan Unity*") at [47]:

> … If the arbitral tribunal decides that it has jurisdiction to determine the dispute, the plaintiff can place the very same arguments before the arbitral tribunal for its consideration on why the time bar does not apply, both in fact and in law. **It is not for the courts to pick and determine what issues should be placed before the arbitral tribunal by way of imposing conditions to a stay of court proceedings**, where parties have already consented to refer their dispute to arbitration, and where the relevant issues fall within the scope of the arbitration agreement. This must be so if party autonomy is respected.
>
> [Emphasis added]

A similar observation was made at [16] of *The Duden* (cited with approval by the Judge below at [21] of the GD) that the imposition of a condition as to waiver of a defence of time bar can only be justified "in very special circumstances as it takes away a substantive right of one of the parties".

28 In fact, in the arbitration which the appellant commenced on 22 December 2020, the appellant had specifically challenged the defence of time bar and its applicability. Given that the issue of the time bar was a substantive defence to be determined at the arbitration – and the fact that the appellant itself joined issue over the substantive defence of time bar in the arbitration – there did not appear to be any justification to remove that issue from the scope of the arbitration. Unlike the essentially administrative conditions set out in the preceding paragraph which were aimed at *facilitating* the arbitration agreement, the waiver of the time bar defence was not one which sought to give effect to the arbitration agreement.

29 Of course, we do not go so far as to suggest that *all* conditions sought which do not *solely* facilitate or give effect to the arbitration agreement are necessarily impermissible. Rather, reference must be had to all of the surrounding facts and circumstances. However, conditions which do not merely facilitate or seek to give effect to the arbitration agreement ought to be subject to a heightened level of scrutiny, and the threshold for such conditions to be granted may be said to be considerably higher than that applicable for essentially administrative conditions.

The Factors Governing the Court's Exercise of its Discretion to Impose Conditions on a Stay

30 As alluded to above, the Court should take cognizance of all of the surrounding facts and circumstances in determining whether it should exercise its discretion to impose conditions on a stay. In particular, the exercise of the Court's discretion to impose conditions on a stay under s 6(2) of the IAA must be informed by the *justice of the case*. This entails consideration of whether the party seeking the stay is able to put forward a **proper justification** for the imposition of any condition. In determining whether such justification is established, the Court should have regard to (a) the *reasons* for the conditions being sought, and whether those reasons could have been obviated by the applicant's own conduct; (b) whether the need for any of the conditions was contributed to or caused by the conduct of the respondent; and (c) the *substantive effect* on the parties of any condition that the court may impose. This is broadly similar to the approach of the Judge below – see [21] of the GD though in our analysis, in examining whether there was any such proper justification, it is not strictly necessary for the Court to find that the applicant's conduct was "unreasonable" in failing to commence the arbitration within time.

31 The first two considerations focus on the respective conduct of each party, and this should be assessed as a matter of sound commercial practice. Each party is entitled and expected to look after its own commercial interests. In this regard, we reject the appellant's argument that such an approach would be tantamount to imposing "a duty, or an expectation, on the part of the lawful holder of the Bills of Lading to ascertain the terms of the Bills of lading which are held as security as soon as he comes into possession of the same". On this basis, a party seeking a condition will only have itself to blame if the reasons for the condition being sought arise entirely from its own conduct, and the other

party did nothing to cause or contribute to the need for the stay or the imposition of the condition. The position may be different if there was some unconscionable or improper conduct of the part of the other party which lulled the applicant to conduct itself in a particular manner such as (a) misrepresentation, (b) wilful non-disclosure, and/or (c) deliberate design in waiting for a time bar defence to set in prior to applying for the stay, as occurred in *The Xanadu*. In that way, it could be said that the other party's conduct had contributed to or caused the need for the condition to be imposed.

32 The third consideration then looks at the *substance* of the condition sought. In this regard, the fact that the Court is being asked to deprive a party of a substantive and accrued defence which ought properly to be determined at the arbitration is a very strong factor *against* the imposition of the condition.

Our Decision

33 Applying the considerations outlined above to the instant facts, we did not see any legal basis for exercising our discretion in favour of the appellant to grant the condition sought.

34 First, while the appellant knew from the outset that there was, at the very least, a potential arbitration clause which would govern any disputes arising under the Bills of Lading, it chose not to take *any* steps to verify or find out about that clause. This was despite the arbitration clause having been incorporated on the face of the Bills of Lading. The fact of the matter – and the fact which the appellant was simply unable to run away from – was that the appellant sat on its hands for almost a whole year, taking a risk which was clear and apparent from the Bills of Lading, a risk it could be inferred that it had *elected* to accept.

35 Second, the appellant claimed that it had asked Amrose for the charterparty, but that Amrose had deliberately failed to provide a copy. Even if one were to take the appellant's case at its highest that it had asked Amrose for a copy of the charterparty, the glaring fact was that Amrose was only asked for the charterparty in *July* 2020, *ie* some 10 months after the appellant came into possession of the Bills of Lading. Furthermore, we also noted that there was simply no documentary evidence *whatsoever* of the appellant's efforts to obtain a copy of the charterparty from Amrose. In our view, the appellant's suggestion that it had sought a copy of the charterparty from Amrose was disingenuous. We should add that even if this was true, that had nothing whatsoever to do with the respondent. The appellant had and continues to have a separate cause of action against Amrose under the MOU.

36 Third, the appellant's explanation that it did not take any further steps *vis-à-vis* Amrose because it was in commercial negotiations with Amrose over the overdue payment did not assist it. What was significant from this disclosure was that it made clear the appellant was well aware that Amrose had taken delivery of the cargo *without* presentation of the Bills of Lading. In our view, this explanation served to make the appellant's case worse. It was clear that the appellant had elected to look to the buyer of the Cargo, Amrose, for payment *notwithstanding its own awareness that the respondent was allegedly in breach of the Bills of Lading* for having delivered the cargo without production of the Bills of Lading. This rendered the appellant's failure to take any steps to commence arbitration against the respondent prior to the time bar setting in all the more egregious.

37 Fourth, the appellant's explanations for its failure to approach the respondent for the charterparty earlier were speculative and outrageous. The

appellant suggested that notifying the respondent of its potential claims, as would necessarily have happened if it were to request a copy of the charterparty, "could have resulted in the respondent taking active steps to avoid the appellant's claims". These steps were said to include the respondent performing litigation searches to check if the appellant had filed protective writs in particular jurisdictions and taking steps to avoid those jurisdictions, as well as changing the ownership of its vessels to prevent the appellant from proceeding in jurisdictions in which it had yet to file protective writs. With respect, there was simply no basis in the first place to suggest that the appellant's alleged concerns were in any way engendered by the respondent's conduct. Further, it was plainly baseless to suggest that the respondent would change its trading route, potentially in breach of its charterparty obligations, to evade the appellant's claim. Equally devoid of substance was the suggestion that the respondent would change the ownership of its vessels to frustrate the appellant's claim. In fact, at the first available opportunity after the arrest, the respondent, through China Navigation's solicitors, drew the appellant's attention to the arbitration clause. The frivolous aspersions the appellant attempted to cast at the respondent were totally unjustified.

38 Fundamentally, the truth appeared to be that the appellant simply did not *bother* to ask the respondent for a copy of the charterparty. Rather, it waited until the very last minute, asking for a copy of the charterparty on the *night* before the time bar accrued. When the request was made, a copy of the charterparty was duly provided to the appellant. The appellant took the risk in not finding out about the terms of the Bills of Lading, which it recognised were its security, with the consequence that it commenced the Admiralty Actions in breach of the arbitration clause and found its claims under the Bills of Lading potentially time-barred in the arbitration. Having taken that risk, it does not lie

in the appellant's mouth to assert that it should be insulated by the Courts from the consequences of its own omissions. This was especially so since Counsel for the appellant, Mr Bazul Ashhab bin Abdul Kader ("Mr Bazul"), candidly and correctly acknowledged at the hearing that the respondent had done nothing to cause or contribute to the appellant's omission to commence the London arbitration prior to the accrual of the time bar.

The Relevance of the Quantum of a Claim

39 At the appeal hearing, Mr Bazul also conceded that the size of the appellant's claim was not relevant in determining whether or not hardship would be caused were a condition not imposed. To clear up any residual uncertainty, we believe it is useful to explain why the size of the claim is irrelevant in determining whether or not a condition for the waiver of a time bar ought to be imposed.

40 In support of this proposition, the appellant initially relied on *The Xanadu*. At [6] of *The Xanadu*, Lai Kew Chai J observed as follows:

> I was not persuaded that the learned assistant registrar had exercised her discretion erroneously in any way. Although she had to order a stay, she was entitled to impose terms and conditions as appear reasonable or required by the ties of justice. For the following reasons, I would go further and state that I would have imposed the same condition in the circumstances of this case. Firstly, there was, at the least, sufficient ambiguity which was reasonably entertained by the plaintiffs on the question whether the relevant bill of lading had identified the arbitration clause which was invoked. It was therefore reasonable for the plaintiffs to have commenced these admiralty proceedings. Secondly, the defendants waited until after early September 1996, after the expiry of the time bar, before they filed their application on 20 September 1996 to stay these proceedings. It was noteworthy that the statement of claim was filed on 13 August 1996. *Thirdly, if the condition was not imposed, the plaintiffs would suffer undue and*

> *disproportionate hardship, seeing that their claim is in excess of US$222,518.*
>
> [Emphasis added]

While *The Xanadu* did refer to the plaintiffs suffering "undue and disproportionate hardship, seeing that their claim is in excess of US$222,518", that observation was made in the light of the other two more crucial factors in play. In any event, that approach was not adopted in *The Duden*. While Andrew Ang J cited [6] of *The Xanadu* in *The Duden*, he made no reference to the quantum of the claim. In fact, Andrew Ang J did not even identify potential hardship that might be suffered as a factor in deciding whether or not to impose the condition sought.

41 In our view, it should be apparent even from a cursory perusal of *The Xanadu* that the facts there were very different from the present case.

(a) First, in *The Xanadu*, Lai J specifically observed that there was, at the least, "sufficient ambiguity which was reasonably entertained by the plaintiffs on the question whether the relevant bill of lading had identified the arbitration clause which was invoked". While Lai J did not, in the course of his short judgment, identify precisely what this ambiguity was and what it constituted, it was clear that such ambiguity did *not* at all arise on the instant facts. On the contrary, the charterparty incorporated into the Bills of Lading was specifically identified, including by its date. Moreover, the appellant in this case was not confused as to which arbitration clause was invoked, but rather simply did not take the effort to find out anything about the arbitration clause which had been incorporated. The ambiguity which at least in part

animated the Court's decision in *The Xanadu* was markedly absent from the present case.

(b) Second, Lai J in *The Xanadu* also pointed to the defendants in that case having behaved in a cynical manner in waiting until after early September 1996, after the accrual of the time bar, to file their application for a stay on 20 September 1996. This was despite the statement of claim having been filed by the plaintiffs on 13 August 1996. On the facts of the present case, it was common ground that the respondent was entirely blameless. This might well have explained why the appellant had abandoned its suggestion, which had been made below, that the respondent had behaved in a blameworthy fashion.

Fundamentally, *The Xanadu* was a case with other factors in play which led to the imposition of the condition. The reference to the size of the claim at [6] of *The Xanadu* had merely been made in passing.

42 In any event, and for avoidance of doubt, we were of the view that the size of the claim is *not* relevant in determining whether hardship would be engendered if a condition was not imposed:

(a) First, even assuming that the size of the claim was material, it would be impossible to conclusively state *when* the line would be crossed such that a claim was sizeable *enough* to warrant the imposition of a condition that a time bar defence be waived. Put simply, it would be completely arbitrary whether a claim was deemed to be sizeable or not.

(b) Second, and critically, hardship worked both ways. If the size of the claim were relevant, the party who is required to waive the time bar defence would suffer hardship that is equally disproportionate to that of the party seeking the condition. This would be especially so if the party losing its defence of time bar was in no way responsible for the claimant's omission or failure.

(c) Third, and in the context of time bar, imposing a condition that the defence be waived would operate in absolute terms. Such a condition would either preclude the raising of a time bar defence altogether, or not at all. Once such a condition were to apply, the *entire* defence of time bar would be rendered unavailable, and the same would be true of the converse. The absolute nature of this position means that the *size* of a claim would have highly dramatic and potentially disproportionate effects if it were deemed to be relevant.

We thus made clear that insofar as *The Xanadu* and subsequent cases might have suggested that the size of a claim is relevant in determining whether or not a condition is imposed, such suggestions should not be followed.

Conclusion

43 Ultimately, the reasons underpinning the appellant's seeking of the condition lay entirely upon the appellant's own dilatory conduct. The appellant declined to exercise the diligence to check the terms of a charterparty which had unambiguously been incorporated into the Bills of Lading, and there was no suggestion of any wrongdoing by the respondent which led to or contributed to the appellant's failure or omission. Moreover, imposing the condition sought by the appellant would deprive the respondent of an *accrued* and *substantive*

defence. There did not appear to be any proper justification for doing so.

44 For the reasons set out above, we dismissed the appeal. Having regard to the parties' respective submissions as to costs, we awarded the respondent costs of S$29,000 (all-in). The usual consequential orders were also made.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Bazul Ashhab bin Abdul Kader, Prakaash s/o Paniar Silvam, Tan Yu Hang and Levin Lin Lok Yan (Oon & Bazul LLP) for the appellant;
Cai Jianye Edwin and Dawn Tan Si Jie (AsiaLegal LLC) for the respondent.