Neutral Citation: [2015] IEHC 50

THE HIGH COURT

[2013 No. 2813 P.]

BETWEEN

THE LISHEEN MINE (BEING A PARTNERSHIP BETWEEN VEDANTA LISHEEN MINING LIMITED AND KILLORAN LISHEEN MINING LIMITED)

PLAINTIFF

AND

MULLOCK AND SONS (SHIPBROKERS) LIMITED AND

VERTOM SHIPPING AND TRADING BV

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered the 12th day of January 2015

Introduction
1. The plaintiff in these proceedings is seeking a declaration that it has not entered into any agreement with the defendants for the carriage of cargo between the port of Cork and the ports of Antwerp, Belgium and Stettin in Poland. In the alternative, the plaintiff seeks a declaration that if the plaintiff was a party to such contract, it was entitled to rescind such a contract, and that it did so lawfully. The plaintiff also seeks damages for breach of contract.

2. By notice of motion dated 18th July, 2013 the second named defendant ("Vertom") sought an order staying these proceedings (pursuant to Article 8 of the Model Law as incorporated by the Arbitration Act 2010 and O.56, r.3 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the High Court) and also an order referring the proceedings to arbitration.

The parties
3. The plaintiff is a partnership of Vedanta Lisheen Mining Limited (a company incorporated with limited liability which has its registered office at Lisheen Mine, Thurles, County Tipperary) and Killoran Lisheen Mining Limited (a company incorporated with limited liability also having its registered office at Killoran, Thurles, County Tipperary). The plaintiff firm carries on the business of mining and has its principal office at the Lisheen Mine Killoran, Thurles, County Tipperary.

4. The first defendant carries on business as ship brokers. It is a company with limited liability and it has its registered office at the Shipping Office, Dock Road, Limerick.

5. The second defendant is a company incorporated under the law of the Netherlands and holds itself out as carrying on the business of ship owners. It has its registered office in the Netherlands.

The plaintiff's statement of claim
6. The plaintiff commenced its proceedings by way of plenary summons on 15th March 2013. The plaintiff subsequently issued a statement of claim on 24th September, 2013. The reliefs sought at para. 1 of the statement of claim are unusual because the plaintiff is seeking a declaration that it is not a party to any contract with the defendants for the carriage of cargo between Cork and Antwerp, Belgium and Stettin in Poland. Indeed at para. 4 of the statement of claim the plaintiff pleads that these proceedings were instituted because of the apprehension on the part of the plaintiff that the defendants would wrongly assert that a contract had been concluded between the plaintiff and the defendants for the carriage of cargo.

7. The plaintiff pleads (at para. 6 of its statement of claim) that Vertom, has asserted at different times that various contracts have been entered into between

1. The Lisheen Mine and Vertom or, Lisheen Milling Limited and Vertom on separate routes under different contracts or

2. Lisheen Milling Limited and Vertom under a single contract for two routes.

8. It is further pleaded (at para. 7 of the statement of claim) that Vertom is also asserting that a standard charter- party agreement (set forth in a document called "Gen Con" – which includes an arbitration clause) forms part of this alleged contract. (It is because of this arbitration clause that Vertom has brought its motion seeking to stay these proceedings and to refer the proceedings to arbitration.)

9. The plaintiff pleads that:

1. No contract has been concluded between the plaintiff and Vertom.

2. Even if any such contract had been concluded between the plaintiff and Vertom, no charter- party agreement has been concluded by the plaintiff with Vertom.

3. Even if a charter- party agreement was concluded with Vertom (whether by the plaintiff or by Lisheen Milling Ltd) it is denied that its terms were incorporated into any contract of affreightment as between the plaintiff and Vertom.

10. Subsequent to the issuing of these proceedings by the plaintiff, Vertom commenced arbitration proceedings against Lisheen Milling Limited in London on 22nd March 2013 pursuant to the arbitration clause in the alleged charter- party agreement (which Vertom alleges has been incorporated into the alleged contract of affreightment).

11. In addition Vertom also commenced arbitration proceedings in London against the plaintiff pursuant to the arbitration clause in the

alleged charter- party agreement allegedly incorporated into the alleged contract of affreightment. This notice of arbitration issued against The Lisheen Mine on 9th August, 2013.

Issues.
12. It is clear therefore from the statement of claim and also from the lengthy affidavits and exhibits which have been filed in this application that the issues which arise for consideration by this court are as follows:

1. Was there a contract of affreightment entered into between The Lisheen Mine and Vertom?

2. Did The Lisheen Mine enter into a charter- party agreement with Vertom?

3. Did Lisheen Milling Limited enter into a charter- party agreement with Vertom?

4. Were the standard terms and conditions of the alleged charter- party agreement incorporated into the contract of affreightment.

13. It is common case between the parties that the alleged contract of affreightment does not contain an arbitration clause.

14. It is also common case between the parties that the standard terms and conditions of the alleged charter- party agreement do contain an arbitration clause.

15. Therefore in order for Vertom to successfully argue that these proceedings should be stayed, and that the matter should be referred to arbitration, it would have to establish:

1. That there is a concluded agreement in place between The Lisheen Mine and Vertom for a contract of affreightment.

2. As this contract of affreightment does not contain an arbitration clause, that there is also a valid charter- party agreement in place between The Lisheen Mine (and/or Lisheen Milling Ltd) and Vertom (because such a charter- party agreement does contain an arbitration clause).

3. That the alleged charter- party agreement has been incorporated into the contract of affreightment.

The factual background to this dispute.

(1) The "master/framework" agreement
16. It is necessary in this case to distinguish between two contracts which the parties were seeking to negotiate. These are the so-called "master" or "framework" agreement and the charter- party agreement.

17. On 21st November, 2012 The Lisheen Mine (on Lisheen Mine headed notepaper) wrote to Mullock and Sons (Shipbrokers) Limited with an invitation to tender "for Lisheen Mine". This letter stated as follows:

"Lisheen Mine (the "Organisation") invites your submission of a proposal for the provision of ocean freight services on selected routes as per the conditions detailed in the attached documents.

Please ensure that you read all the documents attached and that you fully understand the requirements.

The documents comprise:

- *This letter*
- *Letter of acknowledgement*
- *Conditions of tendering*
- *Details of Lisheen's requirement i.e. schedule of routes and indicative tonnages per route*

The planned Contract Start Date is 1st January, 2013.

Lisheen intends to issue a one year contract for the ocean freight of zinc and lead concentrates on selected routes. Lisheen reserves the right to reject any and all proposals. Lisheen shall not be liable for any costs incurred in the submission of a proposal.

…….

It is intended that the selection of the preferred service provider following assessment of all tenders received shall be complete on or before 14th December, 2012. All tendering parties shall be advised of Lisheen's decision on or before that date. Lisheen reserve the right not to select the lowest bidder."

18. Attached to this letter were the conditions of tendering. Again these are set out on The Lisheen Mine headed stationery.

19. On a separate document entitled *"Invitation to Tender for the provision of sea freight services on selected routes to Lisheen Mining"* it is stated as follows:

Introduction

Lisheen Mine is a zinc and lead mine located near Thurles in County Tipperary. The mine produces zinc and lead concentrates which are transported by road to the Tivoli Port in the Port of Cork.

At the Port of Cork Lisheen has a storage and ship loading facility capable of loading vessels at a rate of 700mt per hour. Lisheen expects to ship its concentrates to mainly European locations as per Annexure 1.

20. The document then sets out the objectives and requirements of the tender. These include:

- *Key commercial terms*
- *Agency*
- *Service level*
- *Loading restrictions*
- *Cargo size*
- *Tonnage quantities.*

21. Under Agency it is stated that "Lisheen requires that Agents (loading) for all ships be Lisheen Milling Limited".

22. It is clear therefore at the very start of the tendering process that the Lisheen Mine as a legal entity distinguished between it and Lisheen Milling Limited, a limited liability company.

23. Under tonnage quantities it is stated: *"Due to the nature of Lisheen's business it is not yet possible to accurately determine precise quantities and shipping destinations for 2013. Tonnages as provided in Annexure 1 are the organisation's best estimate based on information available at the time of going to tender. Said tonnages are provided as a guide only and the Organization shall not accept any penalty or claim from tendering parties in the event that their tender bid is successful and the tonnages detailed in annexure 2 differ significantly from the actual tonnages to be shipped".*

24. The document then sets out the award criteria which includes service delivery requirements and price.

25. Annexure 1 sets out an indicative 2013 shipping schedule and sets out nine different port destinations, eight different indicative zinc tonnages and two indicative lead tonnages.

26. Annexure 2 consists of a blank pricing submission for the tenderer to fill in on the amount of euros per wmt (wet metric ton) and the commission.

(ii) The standard charter- party agreement.
27. On 27th November, 2012 Simon Mills, the supply chain project manager with The Lisheen Mine sent an email to the first defendant. This email states as follows:

"Please find attached a Q & A document detailing answers to all the questions received in response to the tender to date. Also attached is a typical charter- party as used by Lisheen.

Regards, Simon."

28. On the next page there is a document entitled "Lisheen Mine 2013 Shipping Tender – Questions and Answers".

29. It states:

"Please find below a summary of questions received from all parties and Lisheen's formal response to same.

31. The first question and answer was as follows:

Question: Please advise full style of Agents at load port.

Answer: Lisheen Milling Limited.

32. There followed further questions and answers about the agents at the discharge ports, the discharging conditions at each discharge port, the restrictions in discharge ports about vessel size etc.

33. A key question in the context of this case was:

"Question: Please advise which Charter- party you wish to use.

Answer: Lisheen use the "Gencon" charter (as revised 1922, 1976 and 1994)

Typical example attached." (emphasis added)

34. On the following page there is a three page document which is the recommended Baltic and International Maritime Council Uniform General Charter (code name "Gencon") which is a standard charter- party agreement.

35. I would note the following in respect of this draft standard agreement:

1. Box one - the Shipbroker is stated to be Lisheen Milling Limited.

2. Box two - the place and date is left blank.

3. Box three - the owners/place of business is also left blank but the words "as agents to owners" are set out at the bottom. It is clear however that this box is meant to contain the name of the owner of a vessel.

4. Box four - "Charterers/place of business (cl. (1) - is stated to be Lisheen Milling Limited, The Lisheen Mine, Killoran, Co.

Tipperary.

5. Box five - the vessel's name is left blank.

6. Box ten - the loading place is stated to be Tivoli, Cork.

7. Box eleven - the discharging port is left blank.

8. Box twelve - the exact quantity of cargo is left blank.

9. Box seventeen -the shippers/place of business is stated to be Lisheen Milling Limited.

10. Box eighteen - the agents for loading are stated to be Lisheen Milling Limited.

11. Box 25 - Law and arbitration – The law is stated to be English law and parties agreed to refer disputes to arbitration.

12. Box 26 –"Additional clauses covering special provisions if agreed" – Lisheen then added additional clauses 20 – 38. (emphasis added)

36. Clause one of the Gencon charter states as follows:

"It is agreed between the party mentioned in Box three as the Owners of the vessel named in box five, of the GT/NT indicated in box six, and carrying about the number of metric tons and dead weight capacity all told on summer load-line stated in box seven, now in position as stated in box eight, and expected ready to load under this Charter- party about the date indicated in box nine, and the party mentioned as the Charterers in box four that the said vessel shall as soon as her prior commitments have been completed proceed to the loading port or place stated in box ten or so near thereto as she may safely get and lie always afloat and there load a full and complete cargo as stated in box twelve which the Charterers bind themselves to ship and being so loaded the vessel shall proceed to the discharging port or place stated in box eleven as ordered on signing Bills of Lading or so near thereto as she may safely get and lie always afloat and there deliver the cargo."

37. It is clear therefore from this clause one that the standard charter- party agreement is specifically envisaged to be agreed between

(a) the owners of the vessel as mentioned in box three and

(b) the party mentioned as the Charterers in box four.

38. In the present case, the charterers are specifically stated to be Lisheen Milling Limited, and not the Lisheen Mine (although the matter is not entirely clear).

39. Given that this is a draft charter- party agreement the name of the owners of the vessel are left blank for the time being.

40. It is also noteworthy that the Gencon standard charter- party agreement has two spaces for signatures under Box 26. Thus it was clearly envisaged that both parties would sign this charter- party agreement. It is also common case that there is no such signed charter- party agreement in place.

41. The standard terms and conditions of the charter- party agreement provide at clause 18 for a law and arbitration clause. This provides that the charter- party shall be governed by and construed in accordance with English law and that any dispute arising out of this charter- party shall be referred to arbitration in London.

42. It is also of some significance that the standard terms and conditions of the charter- party agreement contain nineteen standard terms but it allows (at box 26) for additional clauses covering special provisions if agreed. It is noteworthy in this case that the Lisheen Mine in addition to specifying that the charterers would be Lisheen Milling Limited also put forward some nineteen additional special conditions to be agreed – which doubles the amounts of terms and conditions in this standard charter- party agreement. Box 26 refers to "additional clauses covering special provisions, if agreed". This indicates that the parties have to specifically negotiate and agree on these extra conditions.

43. Thus for example clause 20 provides that "the parties to this contract of affreightment agree that the Voyage Charter- party Lay Time Interpretation Rules 1993……shall be incorporated into and shall form part of this charter- party".

44. What The Lisheen Mine, apparently, was seeking to do in its tender was to agree a "Master Agreement" or "framework agreement" which would fix/agree prices per wet metric ton from port A to port B for a period of twelve months rather than negotiate a specific price per voyage for a specific cargo. In addition the parties would also seek to agree the draft general terms for the charter- party agreements (i.e. for each specific voyage).

(iii) Events following 7th December, 2012.

45. On 7th December, 2012 Mullock and Sons, the first defendant, sent an email to Simon Mills of Lisheen in respect of the Lisheen shipping tender. It incorporated in its email the text of an email from Vertom. This set out Vertom's price quotation and various other matters. It also set out a list of vessels which Vertom purportedly owned. It also set out the prices which Vertom were quoting for each port and each material. It also stated: "Our offer is furthermore based on the following:" and there follows a number of conditions and at the end it states:

"- sub agreeing CP details and owners BOD approval". (emphasis added)

46. On 11th December, 2012 Simon Mills sent an email to the first defendant seeking trade referees.

47. On 11th December, 2012 the first defendant replied giving the names of trade referees.

48. On 20th December, 2012 Simon Mills writing on behalf of the Lisheen Mine and on the Lisheen Mine headed notepaper wrote to John Dundon, managing director of the first defendant stating as follows:

"Dear John,

Lisheen Mine 2013 Shipping Tender

Many thanks for submitting prices in response to the tender at subject. Following our telephone conversation of earlier this week please accept this letter as confirmation that Lisheen shall be awarding Mulloch and Sons (Shipbrokers) the following routes: (emphasis added)

The letter then set out the routes from Cork to Antwerp and Cork to Stettin. The letter then states *"I would be grateful if you would kindly draft charter parties for the above routes and send them to myself for review".* (emphasis added)

49. It is clear that the framework agreement whilst identifying specific ports does not nominate specific dates or specific cargos. Therefore on its own the framework master is incomplete i.e. it needs specific individual contracts to fulfil the terms of the master contract.

50. However it is also clear from "the Questions and Answers" document that the architecture of the contractual arrangements which The Lisheen Mine intended to use consisted of two parts

(1.) A framework contract or a master contract between the Lisheen Mine and the successful tenderer and

(2.) A charter- party agreement between Lisheen Milling Limited and the successful tenderer.

51. It is also clear that The Lisheen Mine envisaged that the two contracts would be, in effect, negotiated and concluded at the same time. The framework contract would be fulfilled by each individual charter- party agreement; and in turn each individual charter-party agreement would be referable to the framework contract.

52. However it is also clear that The Lisheen Mine intended that there should be two separate contracts with different contracting parties to each contract.

53. It is also of importance to note that this letter from the Lisheen Mine dated 20th December, 2012 states: *"please accept this letter as confirmation that Lisheen shall be awarding Mullock and Sons (Shipbrokers) the following routes"* (Emphasis Added). This is stated to be in the future tense. It is a statement of future intention. When taken together with the instruction to Mullock and Sons to draft charter parties for the above routes (and to send them to Mr. Mills for review) it suggests in my view that there would be no valid and concluded framework agreement until all the terms of the charter- party agreement between Lisheen Milling Limited and the relevant owners of the vessel were also agreed.

54. It appears that this letter of 20th December, 2012 was sent by Simon Mills to Mullock and Sons by email on 20th December, 2012 at 14.36.

55. On 20th December, 2012 at 14.56 (i.e. some 20 minutes later) the first defendant replied saying "Simon, Many thanks advising Vertom accordingly".

56. The next day on 21st December, 2012 at 12.15 the first defendant sent an email to Simon Mills headed Re: Lisheen Tender stating

"Hi Simon, just to hand from owners – don't see much issue with these extras in C/P [Charter- party] and with your approval will draw up after the holidays, regards John"

57. This email from the first defendant to Simon Mills includes a quote from Vertom to the first defendant which states

"Good Morning all,

Thanks for this…by the looks of it we are heading the right direction

I have read the C/P and have the following remarks.

Extra clause 21: cargo --?—

- Cargo to be loaded in accordance with IMO regulations

- Cargo not to exceed max TML limits

- please insert stowage factor

Extra clause 31

- please add at the end "charterers" however to assist in their best possible means to assist owners

- that's it

- please send recap for owner's approval. (Emphasis added).

58. I would make a number of comments in respect of this email. Firstly, Vertom uses the phrase "by the looks of it we are heading [in] the right direction." This would also appear to suggest that Vertom did not believe that a valid contract had been concluded at this stage. Secondly, Vertom put forward a number of amendments or additions to clauses 21 and 31 which presumably had to be negotiated and agreed with Lisheen Milling Limited. Again this is consistent with the fact that no final agreement had been concluded. Thirdly Vertom asked for "a recap for owners approval" i.e. they wished a recapitulation or summary of the main charter- party terms to be sent to them for final approval and agreement.

59. Simon Mills responded to the first defendant on 21st December, 2012 at 12.26 (i.e. some ten minutes later) saying

"John

Initial view don't see any major issues. Speak in the New Year.

All the best,

Simon".

60. Again however this is expressly stated only to be an "initial view" and that he did not see any "major issue". It is not an unqualified agreement to the suggested amendments to the charter- party agreement. It also expressly states that the parties would speak in the New Year presumably to finalise the charter- party agreement.

61. However, in my view, an objective and reasonable interpretation of the exchange of emails at this point is that Vertom put forward suggested amendments in respect of the additional clauses in the draft charter- party agreement, these amendments were given a cursory review and it was agreed that a final review would be deferred until the new year. That being so, it is clear that there was no concluded charter- party agreement between either Lisheen Milling Limited and Vertom or indeed between any entity on the Lisheen side and Vertom.

62. If there was no concluded charter- party agreement then, (given that it is the charter- party agreement which contains the arbitration clause), there is no valid arbitration clause which applies to the alleged contractual arrangements in this case.

(iv) Events in early January 2013.

63. What then happened was that operational matters overtook the contractual negotiations between the parties. It appears that there was an operational requirement from the mine to ship zinc concentrate from Cork to Antwerp in early January - before the parties (whether The Lisheen Mine or Lisheen Milling Limited) had an opportunity to finalise the charter- party agreement or the master agreement.

64. This chain of events commenced with an email dated 2nd January, 2013 at 13.16 from Katie Corcoran of The Lisheen Mine to John Dundon at Mullock and Sons. This email stated that a first vessel would be required during the second week in January and requested a nomination for a suitable vessel at Mullock's earliest convenience. The requirements were stated to be 7th/8th January, 2013 and a minimum 4,600 wet metric tons of zinc concentrate to Antwerp.

65. On 2nd January 2013 at 13.58 (i.e. approximately half an hour later) John Dundon of Mullock and Sons replied saying that he would check "with the owners now", and saying "thanks for yours, checking with owners now, prior holidays back end next week not before 10th January was mentioned by Simon? Regards John."

66. This email includes a question as to how there was a requirement for such a shipment so early in the new year.

67. Katie Corcoran replied on the same date 2nd January, 2013 at (14.01 i.e. some three minutes later) stating that the mine produced more than was anticipated during the holidays so "we had to bring this vessel ahead a little".

68. Eleven minutes later (on 2nd January, 2013 at 14.08) Mullock and Sons replied saying

"Hi Katie,

Understood, initial response from owners

And there followed a text of an email from Vertom stating

"This first shipment coming earlier than anticipated…what Vertom has are the following positions

M.V. Lady Clara – 3450 DWCC

Or M.V. Estime – 4400 DWCC.

Pleased to hear which position Chrts prefer

regards

Vertom

69. This last sentence is clearly a reference to which position the charterers prefer. The charterers are stated to be Lisheen Milling Limited under the draft charter- party agreement.

70. However within approximately half an hour Katie Corcoran emailed the first defendant, that the vessel must be able to lift a minimum of 4,600 metric tons.

71. Approximately an hour and a half later, (on 2nd January, 2013), the first defendant sent an email to Katie Corcoran asking whether the cargo was a min/max 4,600 ton parcel "or is there an upward margin i.e. 10% plus?".

72. Katie Corcoran replied within two minutes to state that they had "agreed with their customer a min/max of 4,600 wet metric tons".

73. Approximately half an hour later (at 16.53 on 2nd January 2013) the first defendant sent an email to Katie Corcoran stating that "With such very short notice just right now it would appear best owners can offer for this first shipment is M.V. Estime – 4400 DWCC.

74. This ship was clearly below the required weight i.e. it could not carry a cargo of the required weight which Lisheen wished it to carry.

75. On the same day 2nd January, 2013 at 18.35 the first defendant sent an email to Simon Mills in respect of this vessel nomination again asking whether a ship with a 4400 tonnage would suffice given the short notice.

76. The following day on 3rd January (at 8.47 am) Simon Mills sent an email to the first defendant stating that there was no flexibility

on 4,600 metric tons.

77. On the same day 3rd January, 2013 at 10.15 (i.e. approximately an hour and a half later) the first defendant sent an email to Katie Corcoran and Simon Mills stating that he thought they had found a solution and they would like to nominate the vessel, M.V. Sirocco. This email also stated:

> *"For good order sake please reconfirm above nomination.*
>
> *-Please advise with whom our agency department in Antwerp has to liaise discharging".*
>
> *Regards*

78. On the same day 3rd January, 2013 (approximately 45 minutes later) the first defendant sent another email to Katie Corcoran and Simon Mills stating "Pleased to have confirmation of acceptance of nomination as per below".

79. A third email was sent half an hour later at 11.41 from the first defendant to Katie Corcoran and Simon Mills saying "Need your confirmation soonest for this performer. Please confirm/acknowledge urgently"."

80. No reply was received to either of these two emails and subsequently twenty minutes later the first defendant sent an email to Katie Corcoran and Simon Mills at 11.58 saying

> *"Good day again*
>
> *Please note vessel has been booked by owners Firm to perform your requirement*
>
> *regards,*
>
> *John."*

81. This extraordinary email brought an immediate response from Simon Mills at Lisheen Mine. He sent an email on 3rd January, 2013 at 12.30 (i.e. half an hour later) saying

> *"John, cancel this booking immediately. You received no confirmation of this nomination from Lisheen written or verbal."*

82. It appears that John Dundon and Simon Mills had various telephone conversations around this time. The first defendant sent an email to Simon Mills also dated 3rd January, 2013 (and also time 12.30) which incorporated an email from Vertom which said

> *"Dear John,*
>
> *thanks for the below. As far as Vertom is concerned we have a signed contract for both Stettin and Antwerp for the year 2013. We have followed the procedure and rules of the tender given by Lisheen Mines and have been honoured accordingly. Which is appreciated."*

Later in the email it states:

> *"Vertom however have done their part and nominated a suitable modern vessel within only 4 working hours. We therefore cannot accept Lisheen Mines not to accept this nomination. Consequently the ship has been confirmed to owners and will perform this voyage".*

83. Simon Mills sent an email to the first defendant on 3rd January, 2013 at 12.42 (i.e. some fifteen minutes later) in response saying

> *"John, It is not acceptable to accept a ship nomination on Lisheen's behalf under any circumstances, thus kindly inform owners that they will not perform this voyage".*

84. On 4th January, 2013 at 13.02 Simon Mills sent another email to the first defendant responding to the Vertom email to the first defendant forwarded to Simon Mills. This email states as follows:

> *"John,*
>
> *I am reverting specifically in response to your email of 3rd January, 2013 timed at 12.30 which forwards text to Lisheen issued to you by Vertom. We find the content of your email to be troubling and also not accurate. We consider it appropriate to make a number of observations at this juncture.*
>
> > *1. We do not have any contractual relationship with Vertom Shipping and Trading B.V. of any nature. The terms of the tender documents are quite clear in this respect. We are currently considering all contractual questions now arising and the status of any contract. We formally reserve our position in all respects on this issue at this time."*
> >
> > *……*
> >
> > *2. We reject any suggestion that we do not have the right to actively accept any nomination. That we are fully entitled to accept or reject a nomination is a position that you and (to the extent relevant) Vertom also share. This is amply indicated by the fact that you nominated both Lady Clara and Estime and we rejected both. You then subsequently nominated Sirocco but we did not accept this nomination and in fact rejected it. How you came to fix this vessel without our authorisation is not understood and not acceptable. We note – but do not understand – Vertom's assertions that they fixed the vessel. Vertom do not appear to be the owners of Sirocco and if you and/or they fixed it without our authorisation then you have done so at your own risk. We have not given any party an unfettered right to enter into contracts on our behalf without our agreement and are disappointed to see such assertions made."*

85. This in turn elicited a response on 4th January, 2013 by 14.57 from Vertom which stated

"As far as we are concerned we (Mullock and Vertom) have a signed COA [contract of affreightment] with Lisheen Mines. That means that any MT of concentrates that will be shipped in 2013 from Cork to both Antwerp and Stettin fall under our mutual COA.

Vertom has the full intention to perform the COA, it perfectly suits our trade and fleet. It furthermore is important to our Antwerp agency office.

"We have negotiated in a fair manner and a good atmosphere and have been awarded the contract via Mullock accordingly. I think all concerned parties have had enough time to make up their minds."

86. At this point in time the battle lines were drawn. Simon Mills on behalf of the Lisheen Mine and on behalf of Lisheen Milling Limited adopted the position that Lisheen Mine and/or Lisheen Milling Limited had no contractual relationship with Vertom of any nature and Vertom stated that it did have a concluded contract of affreightment with Lisheen Mine.

(v) Pre-litigation correspondence

87. Subsequently on 17th January, 2013 Mason Hayes and Curran commenced the pre-litigation correspondence on behalf of Lisheen Mine and stated *inter alia*, as follows:

"You were notified by way of letter dated 20th December, 2012 that Lisheen intended to award the transport of zinc concentrates on the Cork Antwerp and Cork Stettin routes to you. The letter request that you provide draft charter parties for consideration by Mr. Simon Mills of Lisheen.

At that juncture it had been indicated to you that our client intended to appoint you as preferred supplier pursuant to the tender process in respect of the indicated routes. Despite the request in the letter of 20th December, 2012, you did not provide draft charter parties for consideration. Essential terms in respect of voyages such as lay time, demurrage, notice of readiness, withdrawal, limitation of liability in respect of cargo, applicable law and applicable jurisdiction were not determined. It should be noted that Lisheen Mine is not a formal legal entity did not specify the identity of the charterer at that time. We also note from consideration of the tender documents that whereas you purported to submit tenders on behalf of vessel owners, the letter of 20th December, 2012 specified you as the intended preferred supplier and not any other party.

Given the foregoing, the Lisheen letter of 20th December, 2012 is not an acceptance of tender giving rise to a contract. The absence of agreement on contract parties, identity of the charterer, failure to produce draft charter- party terms for consideration as requested are significant material and ongoing considerations which amongst the other outstanding issues prevents the conclusion of any contract of affreightment." (emphasis added)

88. The letter went on to claim that there was no concluded contractual relationship between the parties.

89. This in turn prompted legal correspondence from Vertom's UK solicitors (Mays Brown) and also from the first defendant.

90. In their letter of 14 March 2013, Mays Brown referred to two COAs (contracts of affreightment between Lisheen Milling Ltd and Vertom (-one for Cork/Antwerp and one for Cork/Stettin) and stated that they were instructed to commence London arbitration proceedings pursuant to these COAs arising from "Lisheen Milling Ltd's repudiatory breach(es) of the COAs." There is no mention of any purported agreement between Vertom and The Lisheen Mine.

91. By letter dated 22nd March 2013 Mason Hayes and Curran replied to Mays Brown Solicitors and noted that the Mays Brown letter of 14th March 2013 was the first occasion on which Vertom had asserted that there were two contracts in existence with Lisheen Milling Limited and that this contention was denied.

92. On 22nd March 2013 Mays Brown Solicitors replied to this point stating that the COA was for the carriage of cargos for two separate routes and that "so it may be the case that our client's claims are advanced under a single or alternatively two COAs. For present purposes we are content to proceed on the basis of a single COA for two routes but without admission." Again however this COA was stated to be between Lisheen Milling Limited and Vertom. I would note that this was the second formulation of the Vertom claim. The first claim was that it was two contracts of affrieghtment; the second formulation is that it is one COA for two routes. However both these formulations are stated to be pursuant to an agreement between Lisheen Milling Limited and Vertom.

93. On 3rd April 2013 Mason Hayes and Curran objected to the Vertom arbitration under the standard charter- party agreement on the grounds that no voyage or vessel particulars had been specified and that no specific voyage charter- party had been entered into.

94. In fairness to Mays Brown solicitors (as they pointed out in their letter of 5th July 2013) Vertom commenced London arbitration proceedings against Lisheen Milling Limited on the basis that the letter from Mason Hayes and Curran to Mullock and Sons dated 17th January 2013 stated that "It should be noted that the Lisheen Mine…was not a formal legal entity". Thus in its letter of 5th July 2013 Mays Brown invited Lisheen Milling Limited and/or Lisheen Mine to confirm that, if a valid COA, was concluded the correct parties to that COA were either

1. Vedanta Lisheen Mining Limited and Killoran Lisheen Mining Limited as partners in/and trading as The Lisheen Mine/The Lisheen Mine Partnership/The Lisheen Joint Venture and

2. Lisheen Milling Limited and

3. Vertom Shipping and Trading BV.

95. Likewise in fairness to Mason Hayes and Curran they replied to this letter on 12th July 2013 stating that "a reference on 17th January 2013 to the Lisheen Mine's status as a legal entity intended to convey that it was not a corporate legal entity, given that Mullock has been involved in a tender process conducted by the Lisheen Mine, this was not seen as the central issue". The letter states "at all times we identified the relevant client as being the The Lisheen Mine and indeed our letter of 19th February 2013 to Mullock clearly identifies our client as the "Lisheen Mine Partnership". This letter also states

"We specifically identified the Lisheen Mine as a partnership as early as 19th February 2013 and the Lisheen Mine is the only client on whose behalf we wrote on 17th January 2013. In any event the role of the Lisheen Mine is not relevant as

both your client and Mullock have expressly asserted that the alleged contractual counterpart is Lisheen Milling Limited and your client has purported to commence arbitration against this entity.

…..

However if your client can explain how it is alleged that an arbitration clause in a purported charter- party between Lisheen Milling Limited and an unidentified ship owner is incorporated into the tender documentation so as to govern the entire relationship indicated in the tender documentation, we will take further instructions and our client will give the matter due and proper consideration".

96. On 25th July 2013 Mays Brown replied to this letter stating "It is our client's intention to advance its claim under the COA in London arbitration against the Lisheen Mine/The Lisheen Mine Partnership and Lisheen Milling Limited."

97. The next response of Mays Brown as Vertom's solicitors was to issue a notice of arbitration by letter dated 9th August 2013 referring any disputes between The Lisheen Mine and Vertom arising under or in connection with a contract of affrieghtment between The Lisheen Mine Partnership COA and Vertom to arbitration.

98. It is clear from the above exchange of correspondence that there was total confusion certainly on the part of Vertom as to who the exact parties to each alleged agreement were. Thus there was a confusion about

(a) Who were the parties to the alleged framework agreement (who appear to be The Lisheen Mine and Vertom) and

(b) Who were the parties to the alleged Charter- party Agreement (– who appear to be Lisheen Milling Limited and Vertom)

99. In addition there appeared to be a conceptual confusion between the Framework agreement (in respect of which the original tender was issued) and the collateral or parallel agreement for the Charter- party Agreement. This conceptual confusion about the nature and extent of the Framework agreement and the Standard Charter- party Agreement and the respective parties to each agreement lie at the heart of this dispute between the parties.

100. However in my view one matter is clear: given that there was such conceptual confusion between the parties (and their lawyers) about the Framework agreement and the Charter- party Agreement and given that there is such confusion about which companies were parties to which agreement, it is difficult if not impossible to conclude, as a matter of law, that there were any valid agreements entered into between any of the parties either on the framework agreement or on the standard charter- party agreement.

101. I am also assuming for the purposes of this case that Mullock Shipbrokers were at all times acting as agents for and on behalf of Vertom.

Consideration of the legal issues.
102. I turn now to a consideration of the legal issues involved. There are essentially three primary legal issues which arise for consideration in this matter. These are

1. Whether there was a concluded Framework agreement contract between The Lisheen Mine and Vertom.

2. Whether there was a concluded charter- party agreement between The Lisheen Mine Limited and Vertom Limited and/or between Lisheen Milling Limited and Vertom Limited.

3. If so, whether the terms of the standard charter- party agreement (which contain an arbitration clause) could be incorporated into the framework agreement.

103. However before considering these matters, it is necessary to set out the legal framework, and context in which this application is made.

Contracts of affreightment
104. One of the problems in this case has been the proper characterisation of the two alleged contracts which have been entered into. At various times the framework agreement has been referred to as a "master agreement" or a "framework" agreement or a "contract of affreightment". Likewise at times the charter- party agreement has also been referred to as either a charter- party agreement or a "contract of affreightment".

105. As is stated in Halsburys Laws of England (5th edition volume 7 page 178) on Carriage of Goods by Sea;

"Contracts of affreightments generally.
A contract for the carriage of goods in a ship is called in law a "contract of affreightment". In practice these contracts are usually written and most often are expressed in one or other of two types of document called respectively a charterparty and a bill of lading. Since the contract of carriage will have been entered into before the bill of lading is issued, the bill of lading itself is not strictly speaking the contract of carriage but is usually the best evidence of its terms. In some cases the terms of a contract of affreightment are contained partly in a charterparty and partly in a bill of lading …..

The term "contract of affreightment" is also used in the market to refer to long term arrangements between shipping lines and cargo interests providing for the supply by the former to the latter of shipping space on several vessels over a long period of time, the use of each vessel being covered by the terms of the overall contractual arrangement and possibly by separate charter parties covering a particular vessel".

106. The above description is helpful because it establishes that the framework agreement and the charter- party agreements can both be called contracts of affreightment; Because of this I will refer to the "framework agreement" as the "framework agreement" and the "charter- party agreement" as the "charter- party agreement" to avoid confusion.

The Arbitration Act 2010
107. Section 2 (1) of the Arbitration Act 2010 defines the "Model Law" as meaning the *"UNCITRAL model law on international*

commercial arbitration (as adopted by the United Nations Commission on International Trade Law on 21st June 1985 with amendments as adopted by that Commission at its thirty-ninth session on 7th July 2006) the text of which is set out in Schedule 1."

108. Section 6 of the Arbitration Act 2010 provides that *"Subject to this Act, the Model Law shall have the force of law in the State and shall apply to arbitrations under arbitration agreements concerning -*

> *(a) International commercial arbitrations or*
>
> *(b) Arbitrations which are not international commercial arbitrations."*

109. Section 2 (1) of the Arbitration Act provides that "an arbitration agreement shall be construed in accordance with Option 1 of Article 7".

110. Schedule 1 of the Act sets out the text of the UNCITRAL model law on international commercial arbitration. Option 1 Article 7 deals with "Definition and form of arbitration agreement". It provides as follows:

> *(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(2) The arbitration agreement shall be in writing.*
>
> *(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally by conduct or by other means.*
>
> *(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."*

111. Article 8 of the UNCITRAL Model Law which is headed *Arbitration* agreement and substantive claim before court provides as follows:

> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

112. The effect of this provision in Article 8 (together with the provisions of Article 7) means that before a matter can be referred to arbitration there must be an arbitration agreement.

113. Article 16 of the Model Law deals with the competence of an arbitral tribunal to rule on its jurisdiction and provides:

> *"(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreements. For that purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

The nature of the jurisdiction of the court in such applications.

114. There is a debate about the exact nature of the jurisdiction of the court in considering such applications. This debate is whether the court should consider whether there is an arbitration agreement either on a *prima facie* basis or on a "full judicial consideration" basis.

115. The issues of the jurisdiction of the court to consider the existence of an arbitration agreement and the burden and standard of proof were considered by Feeney J. in *Barnmore Demolition and Civil Engineering Ltd and Alandale Logistics Ltd and Others* [2010] IEHC 544. In that case the defendants also sought an order (pursuant to Article 8 (1) of the Model Law and s.6 of the Arbitration Act 2010) referring the plaintiff's claim against the defendants to arbitration and staying the proceedings. The defendants in that case asserted that the plaintiff's claim was subject to an arbitration agreement within the meaning of the Arbitration Act 2010. The plaintiff's main ground of opposition was that there was no arbitration agreement between the plaintiff and the defendants.

116. At paragraph 3 of his judgment Feeney J. states as follows:

> *"Whilst it is the case that an arbitration agreement has a separate existence from the matrix contract for which it provides the means of solving disputes, it is not the case that an arbitration agreement does not have to be agreed between the parties for the parties to be bound by such agreement even though such agreement can be independent or separate. Absent there being an agreement to arbitrate a matter is not the subject of an arbitration agreement and therefore is not covered by Article 8" (emphasis added).*

117. It is clear therefore that there has to be an agreement between the parties to arbitrate.

118. In considering the issue of jurisdiction Feeney J. states at para. 5:

> *"Article 16 of the Model Law provides for the competence of arbitral tribunals to rule on their own jurisdiction. It does so in the following terms 16(1):*
>
> *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."*
>
> *That Article permits an arbitral tribunal to decide questions of jurisdiction including the existence of an arbitration agreement. It is the existence of an agreement to arbitrate which is the core issue before this Court. However, Article 16 is not mandatory and the existence of the power does not have the consequence that the Court is obliged in every instance to refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so itself is disputed. The Model Law does not require a party who contends that there is no arbitration agreement to*

have that question decided by an arbitral tribunal. The Court in exercising its jurisdiction under Article 8 has to consider whether the litigation in which an application is brought is the subject matter of an arbitration agreement. Therefore, whilst the doctrine of "Kompetenz-Kompetenz" which is given effect in Article 16 provides that the arbitral tribunal has the jurisdiction to determine whether or not the arbitration agreement ever existed, that power does not mean that the Court does not have the power to consider and decide whether or not an arbitration agreement exists and the Court is not precluded from making such inquiry and deciding if there is an arbitration agreement. Article 8, which is the Article invoked by the defendant applicants in this case gives the Court the jurisdiction to decide if a matter is subject to an arbitration agreement. This Court has the jurisdiction to rule on whether the arbitration agreement relied upon by the defendants exists or was ever agreed. In exercising its jurisdiction under Article 8 the Court can only do so if the Court is satisfied that the action is in a matter which is the subject of an arbitration agreement."

119. This statement of law by Feeney J. was accepted by both parties and it was agreed that the court in this case has the jurisdiction to rule on whether the arbitration agreement relied upon by the defendants exists or was ever agreed.

120. The learned High Court judge also went on to consider the standard by which a court should consider whether there is an arbitration agreement. As Feeney J. stated at paras. 6 to 9 of his decision:

"6. The entitlement of both the Court and the arbitral tribunal to rule on the existence of an arbitration agreement has given rise to extensive discourse. In light of the fact that both a court and the arbitral tribunal have jurisdiction to consider and rule on the existence of an arbitration agreement the issue arises as to the standard of judicial review which should be applied by the Court in exercising its jurisdiction on this matter under the Model Law. This matter is summarised in the textbook by Gary B. Born entitled International Commercial Arbitration (at Chapter 6, p. 881) where he deals with the issue of prima facie versus full judicial consideration of interlocutory jurisdictional challenges under the Model Law. He states:

> *"When a party seeks an interlocutory judicial determination of jurisdictional objections, prior to any arbitral award on the subject, there is uncertainty regarding the standard of judicial review that should be applied by a court under the Model Law. As discussed below, the text of the Model Law, and many judicial authorities, strongly suggest that full judicial review of the jurisdictional objection is appropriate, at least in some circumstances. In contrast, as also discussed below, some judicial authority, and some aspects of the Model law's drafting history, suggest that only prima facie interlocutory judicial consideration is ever appropriate."*

At the hearing before this Court counsel on behalf of the defendants contended that the appropriate approach to take was for this Court to hold that if the defendants established a prima facie case for the existence of the arbitration agreement that then the Court should refer the matter to arbitration and allow and permit the arbitral tribunal to consider the matter and if necessary to rule on the existence of the arbitration agreement. Counsel on behalf of the plaintiff contended that the correct approach to Article 8 was for the Court to give full judicial consideration as to whether or not an arbitration agreement existed.

7. In the United Kingdom the courts have determined that any argument as to the existence of the arbitration clause itself or as to the scope of the clause will, other than in exceptional circumstances, generally be dealt with by the court itself on the basis that even though the arbitrators have the necessary jurisdiction to decide the matter themselves, the existence or validity of a clause is a matter more appropriately dealt with by the court itself. This is identified as being in recognition of the fact that the existence or validity of an arbitration agreement constitutes a threshold to the application before the court. It is acknowledged that this issue raises an inherent tension between the jurisdiction of the court to determine whether an arbitration agreement exists or is valid and whether it extends to the dispute in question and the power of the arbitrators to determine their own jurisdiction under the Kompetenz-Kompetenz principle set out in what is s. 30 of the UK Act of 1996. (See Birse Construction Ltd. v. St. David Ltd. [1999] BLR 194 and [2000] BLR 57 (C.A.) and Al Naimi (t/a Buildmaster Construction Services) v. Islamic Press Agency Inc [1999] CLC 212 and [2000] CLC 647 (C.A.)). Whilst the English courts in resolving the threshold issues in relation to the validity and scope of arbitration clauses have adopted an approach that such issues are to be determined by the court and not by the arbitrators, that is not an approach universally adopted in other jurisdictions. Counsel for the plaintiff argues that the correct approach for this Court to follow, based upon the wording in Article 8(1), is that full judicial consideration should be given to the issue as to whether or not there is an arbitration agreement between the plaintiff and either or both of the first two defendants. Counsel for the first two defendants contend that the correct approach to follow is for the Court to consider whether or not on a prima facie basis it has been established that an arbitration agreement exists and if so an order under Article 8 should be granted.

8. Born in his textbook International Commercial Arbitration in dealing with the issue of prima facie versus full judicial consideration of interlocutory jurisdictional challenges under the Model Law concluded as follows (at Chapter 6, p. 885):

> *"Not surprisingly, given the statutory text and drafting history, the weight of better reasoned national court authority in UNCITRAL Model Law jurisdictions has interpreted Article 8(1) as permitting full judicial consideration (rather than only prima facie review) in either all or some cases involving interlocutory challenges to the existence, validity or legality of the arbitration agreement (but not as to the scope of that agreement which is treated differently). That is the case with judicial decisions in Germany, Canada, New Zealand, Hong Kong and Australia.*
>
> *Despite these decisions a number of other courts in Model Law States have reached the opposite result, particularly in cases involving disputes over the scope of the arbitration agreement, holding that only prima facie interlocutory judicial review was appropriate in determining whether to refer a matter to arbitration."*

Given the terms of Article 8(1) of the Model Law which refers to the matter being the subject of an arbitration agreement, there appears to be a particularly strong case for the argument that any review as to the very existence of the arbitration agreement should be on the basis of full judicial consideration as, if the Court were to stay proceedings where the existence of an arbitration agreement was in issue, such a stay would in effect be a finding in favour of the existence of a valid arbitration clause. (emphasis added)

9. On the facts of this case, it is unnecessary for the court to make any determination as to whether a prima facie or a full judicial consideration should apply in relation to the issue as to whether or not there was an arbitration agreement in this case. That arises from the fact that the Court is satisfied, as hereinafter set out, that on either of those tests the defendants have failed to identify that the action is the subject of an arbitration agreement. Even if the Court was to apply the prima facie test to the existence of the arbitration agreement contended for by the first two defendants, the Court is satisfied that on that test the defendants have failed to establish that there was any arbitration agreement.

121. Clearly therefore an issue which arises in this case is whether the court should consider

(a) whether it has been established that an arbitration agreement exists on a *prima facie* basis or

(b) whether it has been established that an arbitration agreement exists on a full judicial consideration basis.

122. Similar issues on jurisdiction were considered by the High Court in *P. Elliot and Company Ltd (in receivership and in liquidation)* and *FCC Elliot Construction Ltd* (McEochaidh J. 28th August 2012) [2012] IEHC 361.

123. It appears that the decision of Feeney J. in *Barnmore* was not opened to McEochaidh J. However McEochaidh J. in his analysis of the position in England and Wales stated as follows at para. 50 of his judgment

"The position in England and Wales concerning disputes as to substantive arbitral jurisdiction - such as the dispute in this case - has been set out in a number of decisions of the Court of Appeal. In Birse Construction Ltd. v. St. David Ltd. [1999] BLR 194, the trial judge set out a clear and logical approach to resolving the question faced by the court…… The trial judge said as follows:

"It is common ground that the following courses are open to me:

1. To determine on the affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings would be stayed in accordance with s. 9 of the 1996 Act

2. To stay the proceedings, but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement ...

3. Not to decide the question immediately, but to order an issue to be tried.

4. To decide that there is no arbitration agreement and to dismiss the application to stay."

124. It is clear that those four courses are also open to this Court. Having said that, the first option and the fourth option are essentially the same (i.e. to consider whether there has been an arbitration agreement made between the parties or not.) Moreover the second option is unattractive because in effect the Court is "washing its hands" of the issue and leaving it to the arbitrator to decide even though the model law provides that the arbitrator may decide the issue - not "must" decide the issue. Thus it is difficult to see on what basis the court would simply decline to consider the issue. The third option (i.e. not to decide the question immediately but to order an issue to be tried) is essentially a variant of one and four (i.e. the Court, in considering whether there is or is not an arbitration agreement may do so on the basis of affidavit evidence; if there is a conflict of fact on the affidavit evidence may consider whether oral evidence is required). On this analysis the four options essentially amount to really only one attractive option and that is for the court to consider whether or not there is an arbitration agreement in existence between the parties.

125. In the present case both parties agreed that the matter could be decided by the court on the basis of the affidavit evidence before the courts and that oral evidence was not required. It is essentially a matter of legal interpretation of the various email exchanges which have taken place between the parties.

126. Likewise McEochaidh J. states at para. 56 of his decision:

"I agree with the proposition that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration but directs a court to grant or not to grant a stay, depending on the threshold issue of whether the parties to the proceedings are parties to an arbitration agreement. If they are, and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then the stay must be granted. Contrarily, if the parties are not bound by an arbitration agreement, then the stay, of course, must be refused."

127. At para. 68 McEochaidh J. states as follows:

"Article 8 of the Model Law directs courts to respect the arbitral process and stay court proceedings not out of deference to arbitration per se but rather as an expression of the most basic concept in the law of contract-i.e., that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved. In this case, the defendant has not proved even to the standard of arguability that it exchanged a promise to arbitrate with the plaintiff."

128. I have also considered the decisions of Laffoy J. in *G. Burns Ltd v. Grange Construction & Roofing Company Ltd* [2013] IEHC 284 and *Mount Juliet Properties Ltd v. Melcarne Developments* [2013] IEHC 286.

129. I also note that the position in the UK was set out by Waller LJ in the Court of Appeal in *Al Naimi v. Islamic Press Agency Inc* (2000) CLC 647 (at page 650):

"The act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. Indeed RSC O. 73 r. 6 in making an express provision for a decision as to whether there is an arbitration agreement suggests that normally a court would first have to be satisfied that there is an arbitration agreement before acting under s.9 (and that a dispute about such a matter falls outside s.9). There will however be cases where it would be right to defer the decision, particularly for example, if the determination of whether or not a contract was made also embraces the determination of the scope of the contract and its ingredients. In some cases it would be better for the court to act under O.73 r.6; in other cases it may be appropriate to leave the matter to be

decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement".

130. Likewise in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 Mance LJ stated in the UK Supreme Court, referring to *Al- Naimi* that

"97. Where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate".

131. In *Al- Naimi* the court held that under s.9 of the UK Arbitration Act 1996 court should be satisfied that there was an arbitration clause and that the subject matter of the action was within that clause before it would grant a stay.

132. As Waller LJ stated in *Al- Naimi* at page 650:

"One of the matters that a court is bound to take to take into account [in considering whether there is an arbitration agreement] is the likelihood of the challenge to an award on jurisdiction under s.67, or, under s.69, on some important point of law connected to the existence of the agreement for which leave to appeal might be given (if it is plainly discernible at that early stage) e.g. its proper law, since it cannot be in the interests of the parties to have to return to the court to get a definitive answer to a question which could and should be decided by the court before the arbitrator embarks upon the meat of the reference. Such a course would mean that the arbitral proceedings would not be conducted without unnecessary delay or expense. On the other hand the court must bear in mind that it must not act so as to deprive the party of the benefit of the contract that it has made whereby disputes are to be referred to arbitration."

133. In an article by Brian Hutchinson entitled The existence of the arbitration agreement and the Kompetenz – Kompetenz principle in Irish law, (2014 Arbitration 73) the author considered the *prima facie* approach and the full judicial consideration approach and states as follows:

"The prima facie review approach has both advantages and disadvantages. An advantage is that it limits the possibility, trouble and expense of concurrent and potentially conflicting jurisdictions hearings before both court and arbitral tribunal. Another is that it further limits the prospect that the courts decision will be regarded as res judicata in a subsequent challenge to the award or, of course in a challenge before the arbitrators. Another is that where the agreement is governed by a law other than the local law, it reduces the need for proof of foreign laws which can be costly and sometimes conflicting. And of course the prima facie approach fits comfortably doctrinally with the Kompetenz – Kompetenz principle. On the other hand there is potential efficiency in having the matter decided immediately and finally by the courts rather than adding the costly procedural layer of constituting an arbitral tribunal to first decide the matter particularly when the tribunals ruling may well be referred back the court in due course. For this reason the English courts have consistently favoured a pragmatic case by case approach with a preference for a full rather than prima facie review, particularly where the existence of a valid arbitration agreement has been at issue. In Al Naimi v. Islamic Press Agency Inc. the Court of Appeal endorsed the approach described by Humphrey Lloyd QC in Birse Construction Ltd v. St. David Ltd (No. 1) that the circumstances of the application to court must be taken into account, the "dominant factors" being the interests of the parties and the avoidance of unnecessary delay and expense, but also that the court which left the matter to be decided by the arbitrator would need to be "virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement". And in its landmark decision in Premium Nafta Products Ltd v. Fili Shipping Co. Ltd [2007] 4 All ER 95 the House of Lords was at pains to stress that while "it will in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute", the power of arbitrators to contemplate their jurisdiction was predicated on the existence of a valid arbitration agreement, and one which was broad enough to encompass questions about the existence and validity of the arbitration agreement as being within its scope. More recently, in Dallah Real Estate and Tourism Holding Co. Ltd v. Ministry of Religious Affairs, Government of Pakistan the UK Supreme Court approved the principle that in an application to stay proceedings under the Arbitration Act 1996 (the 1996 Act) s.9, in both international and domestic cases, it is the courts which will determine the issue of whether there ever was an agreement to arbitrate".

134. Hutchinson in his article also reviews the Irish decisions of *Barnmore, P. Elliot and Co*. and the decision of Laffoy J. in *Mount Juliet Properties Ltd*. In relation to *Barnmore*, Hutchinson noted that Feeney J. weighed up both sides of the argument i.e. the *prima facie* approach versus the full judicial consideration approach "before coming down in favour of the latter in principle." Hutchinson noted however that Feeney J. stopped short of determining which approach should apply for the future because on the facts before him he was satisfied that the defendants had failed to identify that the matter was the subject of an arbitration agreement, (as did Laffoy J. in *Mount Juliet Properties Ltd*).

135. Having considered all the above I am of the view that the more appropriate approach for a court to follow is to give full judicial consideration to the issue as to whether there is an arbitration agreement between the parties. I say this for the following reasons:

1. Firstly it seems to me to be unsatisfactory that a court having heard the matter fully argued before it, should only consider on a *prima facie* basis whether an arbitration agreement exists. If it were to do so, then it would be leaving open the essential question of whether there is an arbitration agreement between the parties on a final and conclusive basis. A finding that an arbitration agreement exists on a *prima facie* basis means that the issue may have to be re-argued before the arbitrator as to whether an arbitration clause exists on a conclusive basis. It is unsatisfactory for the court, for the arbitrator and indeed for the parties themselves. This is entirely wasteful of costs.

2. Secondly, if the court only conducts the analysis to a *prima facie* review level, and it leaves the matter open to the arbitrator, and if the arbitrator decides, that there is or is not an arbitration agreement then that decision itself is open to challenge by way of appeal on a point of law. This means that the courts could be faced with a prospect of having to decide the issue again. It also means that in a worse case scenario the parties might have to fight the issue on no less than three separate occasions. This cannot be in the interests of proper case management.

3. Thirdly the question of whether there is an arbitration agreement is a question of law which is best decided by a court. The courts in this (and other) jurisdictions are well used to considering whether on the basis of the affidavit evidence before the court there is a valid and concluded contract in existence between parties. Moreover if there are disputed

facts on affidavit then oral evidence can be heard before a court to resolve such conflicts of facts.

The Principles Governing the Formation and Construction of Charter-Party Agreements
140. Halsbury also deals with the formation and construction of charter- party agreements at page 191 paras. 219-220 as follows

> ***"219. Formation of the contract, including formalities****. A charter- party usually consists of a signed contract embodying the terms already negotiated and agreed by the parties or their agents. It need not be in any particular form nor is a signed contract necessary provided that the parties have agreed to be bound by identifiable terms. Standard forms of charter- party are however invariably used."*
>
> ***220. Charter parties agreed 'subject of contract' etc****. Where there is an informal agreement between the parties which expressly requires or envisages the subsequent signing of a formal contract, the legal effect of that prior informal agreement depends on the intention of the parties. The parties to a charterparty may, therefore, have entered into a binding contract, whilst envisaging its subsequent replacement by a more formal one; or they may show an intention to be bound only on the signing of a formal contract, the prior informal agreement being of no legal effect.*
>
> *It is common for negotiations to crystallise into a 'recap telex' recapitulating the terms on which 'agreement' has been reached and either indicating that the 'fixture' or 'agreement' is 'subject to details' or expressly listing the 'subjects' yet to be agreed between the parties. Where this is the case it is clear that under English law there is no normally no contract binding the parties until full agreement (where 'agreement' had been reached subject to details) or when the stipulated 'subjects' have been 'lifted' that is to say agreed upon. Thus where the agreement is 'subject to contract, 'subject to details' …..no binding agreement will have been concluded. (See The Star Steamship Society v. Beogradska Plovidba The Junior K [1988] 2 Lloyds reports 583.)*

141. In the present case it is common case that there is no agreed contract charter- party agreement in writing signed by both parties. There is however an exchange of emails and it is a matter for the court to ascertain from these emails whether a contract has been concluded between the parties.

142. In this case the use of the expression subject to details – or words which effectively mean the same thing – clearly shows that Vertom was making its offer subject to details being agreed. It is clear therefore that any agreement to such offer was also subject to the details being agreed. The details were in fact never agreed.

143. Halsbury also deals with the rules of construction of charter parties at para. 227 saying as follows:

> "***Rules of construction:*** *Like any other commercial document, a charterparty must be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract.*
>
> *The legal effect of the particular terms to which reference will be made depends in every case not only on the exact words of the term but also on the language of the charter- party taken as a whole and construed in the light of the circumstances in which it was made."*

145. Likewise at para. 228 Halsbury states as follows

> *"The words used in charterparties are to be understood in their plain, ordinary and popular meaning unless the context shows that the parties, for the purposes of the contract, intended to place a different meaning on the, or unless, by the usage of a particular trade business or port they have to such an extent acquired a secondary or technical meaning that that is clearly the meaning intended by the parties.*
>
> *The words used are to be construed with reference to the surrounding circumstances to which they were intended by the parties to apply and evidence of such circumstances is admissible".*

The "subject to details issue"
146. On 7th December 2012 Mullock and Sons sent an email to Simon Mills of Lisheen. The full text of this email has been set out above. It contains the text of an email from Vertom to Mullock and Sons. It also contains the offer of Vertom to The Lisheen Mine response to the tender. It states in the body of the email

> "our offer is furthermore based on the following:
>
> - sub agreeing CP details and owners BOD approval"

147. The CP referred to therein is clearly the charter- party. This phrase means and clearly means "subject to agreeing details of the charter- party".

148. In *The Junior K* case [1988] 2 Lloyds Reports 583, the parties used the words "sub dets gencon cp". The Court noted that "those expressions mean 'subject to the details of the Gencon charterparty".

149. Steyn J. stated at page 585

> *"The meaning of the relevant expression must, of course, be ascertained against the contextual scene…..*
>
> *The correct approach to that question is to ask how a reasonable man, versed in the chartering business, would have construed those words. There are judicial expressions of opinion on the point. But one is dealing with the meaning of words which have no technical or special meaning and I propose to examine the question first without the aid of authority. The starting point seems to me to be the proposition that if there has been a complete and unqualified acceptance of an offer, prima facie a contract comes into existence even if the parties intend to reduce the agreement to writing. On the other hand, in negotiations parties are free to stipulate that no binding contract shall come into existence, despite agreement on all essentials, until agreement is reached on yet unmentioned and unconsidered*

detailed provisions. And the law should respect such a stipulation in commercial negotiations. That seems to me to be exactly what happened in this case. The Gencon charter -party is, of course a detailed and well known standard form. It is plain that the parties had in mind a contract on the Gencon form but that they had not yet considered the details of it. By the expression "Subject to details of the Gencon charterparty" the owners made clear that they did not wish to commit themselves contractually until negotiations had taken place about the details of the charter- party. Such discussions might have covered a number of clauses. It does not follow that the owners were willing to accept all the detailed provisions of the standard form documents. After all, it is a common occurrence for some of the detailed provisions of the Gencon form to be amended during the process of negotiation. In any event, the Gencon standard form contains within it alternative provisions which require a positive selection of the desired alternative.

…Against this background it seems to me clear that the stipulation 'subject to details of the Gencon charterparty' conveys that the fixture is conditional upon agreement being reached on the details of the Gencon form, which had not yet been discussed. In other words, it was stipulated that there was to be no contract until agreement had been reached on the details of the Gencon charter- party.

What I have described as the stipulation in this particular case is, of course, one that can be displaced in certain circumstances. It can be displaced by a subsequent waiver of the stipulation. It can be displaced by actual agreement on the details. It can also be displaced by an execution of a formal contract. It is common ground, however, that none of these events occurred in this case. Prima facie, therefore, there was no binding contract".

150. Steyne J. also stated at page 588 of his decision;

"And I would respectfully suggest that it is in the interests of the chartering business that the Courts should recognise the efficacy of the maritime variant of the well known 'subject to contract.'

The expression 'subject to details' enables owners and charterers to know where they are in negotiations and to regulate their business accordingly. It is a device which tends to avoid disputes and the assumption of those in the shipping trade that it is effective to make clear that there is no binding agreement at that stage ought to be respected".

Application of the law to the facts

(I) Was there a concluded master/framework agreement?

151. I am of the view that there was no concluded framework/master agreement between the parties in this case for the following reasons:

1. The original letter of 21st November 2012 with the invitation to tender for The Lisheen Mine is clearly an invitation to treat.

2. On 27th November 2012 The Lisheen Mine sent an email attaching a question and answer document which stated that the charter- party which The Lisheen Mine wished to use was the Gencon charter. Thus it is clear that the Gencon charter- party agreement was part of the architecture of the agreements which The Lisheen Mine and Lisheen Milling Ltd intended to enter into. It is clear that Lisheen Mine and Lisheen Milling Ltd intended to enter into a suite of agreements or at least two separate agreements being the master/framework agreement and the charter- party agreement.

3. The master agreement only referred to specific ports and specific rates of charging and commission. It needed a charter- party agreement to complete it or to fulfil its terms. Likewise the charter- party agreement needed the master agreement to fulfil certain terms about prices and commission and freight rates.

4. On 7th December 2012 Mullock and Sons sent an email to The Lisheen Mine in respect of the tender which incorporated the text of an email from Vertom. This set out Vertom's price quotation and various other matters. This clearly constituted an offer from Vertom. However this offer was stated to be based on the following:

"Sub agreeing CPD details and owners BOD approval"

This appears to mean "subject to agreeing charter- party details". Thus the offer was subject to a condition that the charter- party details should be agreed before its offer on freight rates and commission could be finally agreed. In effect this email of 7th December 2012 made the offer on freight rates and commission subject to a condition precedent (i.e. agreement between the parties on the details of the charter- party agreements.) This makes commercial sense because clearly elements of the charter- party agreement could affect the freight rates which Vertom wished to agree with either The Lisheen Mine or Lisheen Milling Ltd.

5. It is Vertom's case that its offer was accepted by The Lisheen Mine because of the letter of 20th December 2012 sent by The Lisheen Mine to Mullock and Sons. This letter states "Following our telephone conversation of earlier this week please accept this letter as confirmation that Lisheen shall be awarding Mullock and Sons the following routes". However Vertom is seeking to seize on the use of the words "accept this letter as confirmation" as proof of acceptance of an offer and therefore proof of the conclusion of a contract. However the letter has to be read in full and in context because the letter goes on to state "I would be grateful if you would kindly draft charter parties for the above routes and send them to myself for review". This clearly shows that it was the intention of The Lisheen Mine (both from the earlier email exchanges and indeed this letter) that the master/framework agreement and the charter- party agreements were to be concluded at the same time. Moreover it is also clear from the Vertom email of 7th December 2012 that it was indeed Vertom's own position that it wanted the master/framework agreement and the charter- party agreements to be concluded at the same time. It is also clear that the proper interpretation of this letter (of 20th December 2012) is that if the parties reached agreement on the charter- party agreements then Lisheen should award the master/framework agreement to Mullock and Sons/Vertom. Therefore it seems that both sides were of the view that there would be no master/framework agreement concluded until the charter- party agreement had been agreed. The parties then turned their attention to the charter- party draft agreement.

6. On 21st December 2012 – the very next day - Vertom sent comments on the charter- party agreement and also the extra clauses to Mullock and Sons who forwarded them on to The Lisheen Mine. They suggested various amendments to

the extra clauses suggested by The Lisheen Mine and/or Lisheen Milling Ltd. It is of note that Vertom in their email state at the end "pls sent recap for owner's approval". It is also of note that Mullock and Sons state "and with your approval will draw up after the holidays". It is clear therefore that Vertom were awaiting a recapitulation of all of the essential terms and that Mullock and Sons would draw up draft charter- party contracts after the holidays. It is also of note that the email from Vertom of 21st December 2012 states "by the looks of it we are heading in the right direction". Again this is more consistent with a progress of negotiations rather than a concluded agreement.

7. Likewise on 21st December 2012 Simon Mills for The Lisheen Mine replied saying "initial view don't see any major issues. Speak in the new year". Thus, just before the Christmas holiday, parties were still in negotiations about the exact terms of the charter- party agreements. They were they believed heading in the right direction but there were certain matters which had to be finalised and agreed between the parties. A recapitulation email would have had to be sent and the exact terms of any charter- party agreement would have had to have been finally negotiated and agreed. This never happened and the operational dispute arose early in January.

8. On 2nd January 2013 The Lisheen Mine then asked Mullock and Sons to nominate a suitable vessel at their earliest convenience. This request however to nominate a vessel occurred in the context where there had only been negotiations in respect of a draft charter- party agreement but no concluded charter- party agreement.

9. Subsequently the parties had a major dispute about the nomination of the suitable vessel and one could not be agreed. Then Vertom/Mullock and Sons nominated a specific vessel without the consent of The Lisheen Mine or Lisheen Milling Ltd and Lisheen Mine and Lisheen Milling Ltd broke off all further negotiations between the parties.

152. In the light of all of the above, it is clear that both parties were of the view that the master/framework agreement could not be finally concluded and agreed until there was a final agreement on the charter- party agreement. However as there was no final or concluded charter- party agreement it follows that there was no concluded master/framework agreement.

153. I would therefore conclude that there was no concluded master/framework agreement entered into between The Lisheen Mine and Mullock and Sons and/or Vertom.

(II) Was there a concluded charter- party agreement?

154. The next issue to consider is whether there was a valid and concluded charter- party agreement between the parties? The analysis set out above also applies to an analysis of this question. For reasons set out above, I am of the view that although the parties were in negotiations about agreeing a standard Gencon charter- party agreement these negotiations had not concluded or "ripened" into an agreement.

155. Moreover in addition to the analysis set out above, I also believe that there was no concluded charter- party agreement between the parties for the following reasons:

1. The email from Mullock and Sons/Vertom dated 7th December 2012 specifically stated that any offer was subject to agreeing details on the charter- party. In effect therefore the offer was made "subject to contract" or as that phrase appears to be used in the shipping industry "subject to the details of the charter- party agreement". Again, as stated above, it makes sense that Vertom did not wish to enter into a long term contract based on agreed freight rate and commission rates until the final details of the charter- party agreement were finalised as this could clearly effect its freight rate and commission rate profitabilitys.

2. It is also clear that the letter of 20th December 2012 from The Lisheen Mine to Mullock and Sons cannot be any evidence that there is agreement on the charter- party agreements given that it is actually a request to Mullock and Sons/Vertom to draft charter- party agreements and send them to Lisheen for review.

3. These draft charter- party agreements were, as a matter of fact, never drafted and sent to Lisheen for review. In the email of 21st December, 2012 Mullock and Sons state that they would draw up the draft charter- party agreements after Christmas. However this never happened.

156. There is no doubt that the parties were engaged in negotiations on a charter- party agreement. It is equally clear however that these negotiations never successfully ripened into a concluded agreement. It is an agreed fact that there is no signed charter- party agreement. However there is no other document which reflects a consensus *ad idem* between the parties on the major or essential terms of the charter- party agreement. It is simply not there. The evidence in this case falls a long way short of what would be required for a court to conclude that there was a concluded charter- party agreement between the parties – whether that be The Lisheen Mine and Vertom or Lisheen Milling and Vertom.

157. In the circumstances I would conclude that there is no concluded charter- party agreement between either The Lisheen Mine and Mullock and Sons/Vertom and/or between Lisheen Milling Ltd and Mullock and Sons/Vertom.

158. Given these conclusions there is no need for me to consider whether The Lisheen Mine and/or Lisheen Milling Ltd were entitled to repudiate such a contract. The issue does not arise.

159. In considering whether the correct test to be applied, in assessing whether there is an arbitration clause, is either the *prima facie* test or the full judicial consideration test I am of the view that the full judicial consideration test is the appropriate test for the reasons which I have set out earlier in my judgment. Having considered all the affidavit evidence before the court I am of the view, applying this test, that there is no concluded master/framework agreement between the parties and there is no concluded charter-party agreement between the parties.

160. However even if I am wrong in this and the appropriate test is the *prima facie* test, I am of the view that the defendant fails the *prima facie* test also. I am of the view that the defendant has not established a *prima facie* case that there was a concluded master/framework agreement between the parties, or that there was a concluded charter- party agreement between the parties.

161. Insofar as Vertom seek to argue that the email exchanges between the parties in early January about the nomination of a new vessel either shows that there was a concluded charter- party agreement or a concluded master agreement between the parties I reject this submission. In fact the best way to characterise this sequence of events is that the operational requirements of the mine meant that the mine wished to transport product sooner than anticipated. As negotiations had been ongoing between The Lisheen Mine and Vertom, Lisheen not unnaturally turned to Mullock Brothers and Vertom to nominate a vessel. It is possible that this process

might have resulted in the parties focusing their mind and agreeing the final terms of the charter- party agreement. However that is not in fact what happened. Instead the parties were distracted by the fact that the nominations offered by Vertom were inadequate. Moreover the nomination of the MV Sirocco by Vertom was not a valid nomination further to a contractual agreement between the parties because there was no such agreement.

162. Likewise I am of the view that it is not true to say that all essential terms on the charter- party were agreed. It is quite clear that they were not.

163. It has not been necessary, for the purposes of this application, to consider the many points which were raised by the plaintiff in their replying affidavits about the financial condition of Vertom, the conflation of Vertom and Vertom USC Holdings BV, and whether Vertom actually own or manage the relevant ships and related matters. Thus I have considered Vertom's case at its height.

Incorporation of arbitration clause in charter- party agreement into framework agreement by reference to the charter-party agreement

164. The essential argument of the defendants in bringing this application for a stay (and a reference to arbitration) is that there is an arbitration agreement in existence between the parties. It is common case however that the framework agreement does not contain an arbitration clause. That arbitration clause is to be found in the draft standard conditions of the charter- party agreement. However even if there is a framework agreement between the parties it appears that this framework agreement is between The Lisheen Mine and Mullock and Sons as agents for and on behalf of Vertom. By contrast the charter- party agreement appears to be between Lisheen Milling Ltd and Mullock and Sons as agents for on behalf of Vertom. There are therefore different parties to each contract. It is therefore a two contract situation. .

165. The issue of incorporation by reference in a two contract situation, was considered in *Habas Sinai v. Sometal S.A.L.* by Clarke J. in the UK High Court [2010] EWHC 29 (Comm). At para. 12 of his judgment he states as follows:

> ***"Are general words of incorporation sufficient?***
>
> *12. The authorities recognise a distinction in approach between cases in which the parties incorporate the terms of a contract between two other parties or between one of them and a third party and those in which they incorporate standard terms.*
>
> *13. Parties are free to incorporate (or seek to incorporate) whatever terms they choose by whatever method they choose. In those circumstances it is unwise to seek to formulate definitive categories. But, with that caveat, most attempts at incorporation of an arbitration (or jurisdiction) clause are likely to fall within one of the following broad categories (in which the terms referred to include an arbitration clause):*
>
> (1) A and B make a contract in which they incorporate standard terms.
>
> These may be the standard terms of one party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.
>
> (2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties.
>
> (3) A and B make a contract incorporating terms agreed between A (or B) and C.
>
> Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub contracts incorporating the terms of a main contract or sub-sub contracts incorporating the terms of a sub contract.
>
> (4) A and B make a contract incorporating terms agreed between C and D."

166. Clarke J. then reviewed a number of authorities on these issues and continued at para. 34 of his judgment;

> *"It is apparent from these and other authorities that various different reasons have been given for the Court's restrictive approach to the incorporation of arbitration clauses in two-contract situations. These are, or include, the following:*
>
> *(a) Arbitration clauses are not "germane" or "directly" relevant to, nor part of the subject matter of, the main contract, and general words must generally be taken to cover only those contractual provisions that are germane to the subject matter of the bill of lading contract (e.g. provisions as to carriage and discharge) and are capable of being operated in conjunction with that subject matter because the court cannot confidently infer that the parties intended to incorporate any more than that: Thomas v Portsea (Lord Loreburn, L.C. and Lord Atkinson; The Annefield, Excess Insurance. See also Moore-Bick J in AIG Europe SA v QBE International Insurance [2001] 2 Lloyd's Rep 268, 273.*
>
> *(b) Arbitration clauses are ancillary provisions by way of dispute resolution essentially personal to the parties which agree them so that general words of incorporation are insufficient; see Sir John Megaw in Aughton; and Excess Insurance p 364 LHC; an arbitration clause is, thus, not incorporated by language which refers to all terms: The Federal Bulker; or all conditions: The Varenna; see also The Delos [1999] 2 Lloyd's Rep 685.*
>
> *(c) Arbitration clauses oust the jurisdiction of the courts and clear words are need for that purpose: Lord Gorrell and Lord Robson in Thomas v Portsea. Section 7 of the Arbitration Act 1979 requires an arbitration agreement to be in writing and shows the need for a conscious and deliberate relinquishment of a right to go to court: Sir John Megaw in Aughton;*
>
> *(e) The terms of a charterparty arbitration clause may not be applicable to disputes between the bill of lading holder and the shipowner - Lords Loreburn, Gorrell and Robson in Thomas v Portsea - and on that account are not to be regarded as incorporated by a general reference.*

(f) The need for certainty in the law: Bingham LJ in The Federal Bulker.

167. Likewise at para. 52 of his judgment Clarke J. states as follows:

> *"I do not accept that the present case is to be regarded as a "two-contract" case. Whilst, literally speaking, there is more than one contract to be considered, being the June contract and whatever other contracts between the same parties are to have some of their terms incorporated, the relevant distinction is between incorporation of the terms of a contract made between (a) the same and (b) different parties. In short there is a material distinction between categories 1 and 2 on the one hand and categories 3 and 4 on the other. In relation to the latter two categories a more restrictive approach to incorporation is required."*

168. The above analysis of the law means, in my view, that in the present case (which is an example of a two contract case because there are two separate contracts and because the second charter- party agreement is between different parties) a more restrictive approach to incorporation by reference should apply. Thus, in my view, even if there were a framework agreement properly concluded between the parties – and I am of the view that there is not – I do not believe that it would be appropriate, as a matter of law, to incorporate an arbitration agreement made in an alleged charter- party agreement between Lisheen Milling Ltd and Vertom into a framework agreement made between The Lisheen Mine and Vertom. Taking the defendant's case at its height and assuming that there are two valid agreements in place these two agreements are essentially parallel agreements. I do not believe as a matter of law or on the facts of this case that it would be appropriate to incorporate the arbitration agreement in the charter- party agreement into the framework agreement.

Inherent jurisdiction

169. The defendant in its notice of motion although not in its legal or oral submissions before the court also sought to stay the proceedings pursuant to the inherent jurisdiction of the court. It is clear that the court has such a jurisdiction. (See Clarke J. in *Kalix Fund Ltd v. HSBC Institutional Trust Services (Ireland) Ltd* 2010 2 IR 581.) However in the light of my findings above that there is no arbitration agreement between the parties I am of the view that there are no grounds upon which I should exercise the court's inherent jurisdiction to stay proceedings.

Conclusion

170. I would therefore conclude as follows:

1. There is no concluded master/framework agreement between The Lisheen Mine and Mullock and Sons/Vertom.

2. There is no concluded charter- party agreement between Lisheen Milling Ltd and Mullock and Sons/Vertom. (Or between The Lisheen Mine and Mullock and Sons/Vertom.)

3. It is common case that even if there was a concluded master/framework agreement this agreement contains no express arbitration clause. Such an arbitration clause could only be incorporated by reference to the charter- party agreement.

4. In the circumstances where there is no master/framework agreement and/or no concluded charter- party agreement there is therefore no arbitration agreement between the parties.

5. In the circumstances the defendant's application to stay the within proceedings and refer the dispute to arbitration is refused.