

Case No: 2009 Folio 1660

Neutral Citation Number: [2009] EWHC 3629(QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 22 December 2009

BEFORE:

MR JUSTICE CHRISTOPHER CLARKE

BETWEEN:

TRANSFIELD SHIPPING INC

Applicant/Claimant

- and -

CHIPING XINFA HUAYU ALUMINA CO LTD

Respondent/Defendant

MR S.J.PHILLIPS, Q.C. (instructed by Richards Butler) appeared on behalf of the Claimant

MR SEAN O'SULLIVAN (instructed by Stephenson Harwood) appeared on behalf of the Defendant

Approved Judgment

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101 Finsbury Pavement London EC2A 1ER

Tel: 020 7422 6131 Fax: 020 7422 6134

Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com

(Official Shorthand Writers to the Court)

MR JUSTICE CHRISTOPHER CLARKE:

1. This is an application for an anti-suit injunction restraining the respondent, Chiping Xinfu Huayu Alumina Co Ltd (“Chiping”), from taking any steps other than steps to abandon or discontinue the relevant proceedings in relation to the action which Chiping has commenced in China, which is due to be tried on 28 December this year.

Background

2. The applicant, Transfield Shipping Inc (“Transfield”), is a Panamanian corporation and a shipping company whose activities are based in Hong Kong. Chiping is an aluminium importer based in the Shandong Province in the People’s Republic of China.
3. In late 2005, Transfield entered into two voyage charters, which I will call the 2005 charters, with Liaocheng Xinfu Huayu Alumina Co Ltd (“Liaocheng”). These contracts, which were on amended 1976 Baltic and International Maritime Conference Uniform General Charter (GENCOM) terms, both contained London arbitration clauses and were performed. According to the evidence of Mr Shepherd of Richards Butler, Transfield thought that the Liaocheng was essentially the same company as Chiping. It is not in fact the same company, although the two companies apparently have a common shareholder.
4. The recap for the first charter had specified arbitration in London, English law and “*Other terms n conditions as per ovr’s gencon cp*”. Transfield and Liaocheng later signed and stamped an amended pro forma 1976 GENCOM form, with Transfield’s usual rider clauses. The recap for the second charter also provided for English law and arbitration and “*OTHERWISE AS PER OWRS PERFORMED CP*”. The parties later signed and stamped an amended pro forma 1976 GENCOM form, with Transfield’s usual rider clauses.
5. In late July 2008 there were negotiations between the present parties in relation to a possible contract of affreightment in relation to the carriage of a series of cargos of bauxite in bulk from India to China. On 1 August 2008, Chiping entered into a contract to purchase 400,000 metric tons of bauxite from Honor Resources International Co Ltd (“Honor Resources”), FOB Jalgad, India.
6. By the end of July 2008, the parties had reached agreement on the key terms of the contract of affreightment.

29 July

7. On 29 July, Mr Samuel Yu of Transfield sent a recap to Mr Zhang of Chiping, recording what had been agreed. This recap began with the words:
“*MANY THANKS FOR YOUR EFFORTS SO FAR. WE WOULD LIKE TO MAKE THE FOLLOWING RECAP.*”

In the email, Transfield indicated that it was also providing the recap by fax and invited Chiping, if the recap was agreeable, to give a confirmation by return by signing and stamping the fax and sending it back to Transfield’s Beijing office.

8. The recap referred to a “*PRO FORMA C/P PER OWNER’S PERFORMED GENCOM C/P*”, but no such charter party, or no charter party identified as such, had at that stage been provided to Chiping. The recap also provided “*RECAP SUBJ TO CHTRS RECONFIRMATION BEFORE 1800 HRS ON 29 JULY 2008*” and also provided “*SUBJS (sic) DETAILS*”. Chiping responded in an email later that day to propose some changes in the terms suggested in the recap.

1 August

9. There were then some further discussions between the parties on 30 July and 1 August 2008 by email. On the afternoon of 1 August 2008, a scanned version of the recap, now signed at the foot by Transfield, was sent to Chiping. It was still said to be “*SUBJS DETAILS*” and no pro forma charter party had yet been provided. Chiping signed, stamped and returned the recap to Transfield. Transfield submits that it was then that a contract was made.
10. Mr Yu of Transfield’s evidence is that the inclusion of the words “*SUBJS DETAILS*” was “*strictly in error*”. In the arbitration proceedings to which I shall shortly refer, there is a claim for rectification. The inclusion of the words is said to be in error as being inconsistent with (a) the effort put in by the parties to reach agreement; (b) the manner of its conclusion by recap, referring to owner’s performed GENCOM charter party, as had happened in respect of the 2005 charters; and (c) the signing and stamping of what is said to be the contract. Reliance is also placed on the fact that Chiping had contracted with Honor Resources and needed to agree a contract of affreightment and also on what happened when Chiping sought to extricate itself from the agreement.
11. Mr Zhang of Chiping’s evidence is that he understood that there was an agreement in principle on the main terms, subject to negotiation on further terms, and that that was his understanding of the meaning of the phrase “*SUBJS DETAILS*”.
12. Transfield submits that the words “*PRO FORMA C/P PER OWNER’S PERFORMED GENCOM C/P*” refer to the amended 1976 GENCOM charter party on whose terms the 2005 charters had been concluded. Mr Zhang of Chiping had been personally involved in the negotiation of those contracts. Moreover, on the evidence, Transfield submits, there was no other charterparty between Transfield and Chiping or Liaocheng or any associated company to which reference could, looking at the matter objectively, have been made.

4 August

13. On 4 August, a draft charterparty form (using GENCOM 1976) was emailed to Ms Chen of Chiping for the purpose of agreeing the details. The next day she responded with some initial points, including a request for the deletion of the P & I bunkering clause.

6 August

14. On 6 August, Transfield provided a further charterparty party form, this time based on the GENCOM 1994 form, which, as completed, provided for English law and London arbitration. According to Transfield, this happened because in a telephone conversation on 5 August Mr Yu of Transfield had agreed to Ms Chen’s request for that GENCOM form to be used. According to Mr Yu, Ms Chen made no reference to the arbitration clause at this stage. In the 6 August email, Mr Yu had also responded to

the comments made by Ms Chen on 5 August agreeing to one of them and disagreeing with the others.

7 August

15. On 7 August, Ms Chen proposed some further adjustments to the draft agreement. One was that the arbitration clause should provide for arbitration in Hong Kong, rather than in London.
16. There was then a telephone conversation between Mr Yu and Ms Chen. According to Mr Yu, he explained that London was the most appropriate and ordinary place for arbitration and Ms Chen agreed to maintain London as the seat.
17. According to Ms Chen, there was a short conversation, the gist of which was as follows. Mr Yu said that he had received her email and asked whether she intended to change the seat of the arbitration from London to Hong Kong. She said yes and he asked why. She said that Chiping was more familiar with Hong Kong, that it was more convenient because it was closer to China and also that Chiping had specified Hong Kong in a number of contracts. Mr Yu then said that Transfield believed that London was cheaper than Hong Kong and was in many respects a better choice. She then asked for some time to discuss the matter with her superior, Mr Zhang, to which Mr Yu agreed.
18. Mr Yu followed this conversation up with a further email, in which Transfield agreed with two of Ms Chen's proposed amendments. The email ended with the words:
"3. Per our telcon, we maintain London. Therefore, charter party is all clean."
19. Transfield maintains that, if no contract had been made before, a contract was concluded on 7 August.
20. Chiping did not respond to that message. Transfield relies on that as indicating that Chiping accepted that there was a contract. But Chiping says that no reply was ever sent because Ms Chen still needed to speak to Mr Zhang, who was away on compassionate leave following the death of his mother until 19 August.

Posting of the charterparty and Mr Zang's return

21. In the meantime, Transfield posted a clean copy of the draft charter party to Chiping for signature on 15 August. Chiping did not, however, sign it.
22. By the time Mr Zhang returned, movements in the aluminium market were such that it was becoming less likely that Chiping's potential purchase of the Indian bauxite would go ahead as envisaged.

Late August

23. According to Transfield, in late August Mr Zhang of Chiping spoke to Mr Zhang of Transfield and asked for a reduced freight rate in the light of the falling market. Nothing was agreed and Chiping was asked to put its proposal in writing. It was not suggested that there was no contract in existence.

24. According to Mr Zhang of Chiping, he was telephoned in late August by Mr Zhang of Transfield, who asked him why the draft charter party had not been signed. Mr Zhang of Chiping explained that as a result of the collapse in the aluminium market, Chiping was not in a position to conclude the agreement. Mr Zhang of Transfield responded by saying that in his view there was a binding agreement and he asked Chiping to put its position in writing.

25. Chiping complied with this request. In an email whose subject was “*Suggestion of cancelling India contract of carriage by sea*”, Mr Zhang said:

“Faced with the tremendous pressure of production costs in a poor market for oxidised aluminium, we are forced to request to cancel the Contract of Carriage by Sea signed on 1 August 2008 for the shipment of India bauxite. We detail our request below

[He then set out the problems that had arisen in the aluminium market].

Based on the reasons above, we request to cancel the India Contract of Carriage by Sea entered into with you. We hope that you will understand our difficulties and that we are under tremendous pressure to survive. We look forward to your understanding and support. We hope to keep a good working relationship with you.”

26. Transfield submits that this email showed that Chiping was well aware that there was an existing contract between it and Transfield, which it was now suggesting should be cancelled and which it was asking Transfield to be allowed to cancel.

27. Mr Sean O’Sullivan on behalf of Chiping submits that it is unrealistic to read too much into the language used by a non-lawyer from a different culture in which confrontational language is often avoided and, in any event, the communication came long after the alleged contract. At most, he submits, it casts some (though not much) light on the subjective view of Mr Zhang but not on the relevant question: what did the parties objectively agree?

28. On 9 September 2008, Transfield responded to make it clear that it considered the contract had officially taken effect. The email read:

“Dear Mr Liu,

In the circumstances that the economy of China is entering an adjustment period and that the domestic market for oxidised aluminium is down, we understand that you are facing tremendous pressure on your production costs. However, an obligation under a contract is strict. We cannot accept your suggestion of terminating the India Contract of Carriage by Sea. Our replies are as follows:

1. Both parties have already officially confirmed the contents and terms of the contract on 7 August 2008. The contract has officially taken effect. We have begun our work of co-ordinating and organising capacity ...

Cancelling the contract will definitely cause us significant loss and unforeseeable consequences which we could not accept. At the same time, we also understand the market pressure faced by you. In line with our win-win business concept, we hope that both parties can find a more constructive way in this difficult situation.”

29. No written reply was given to that email.
30. On 6 October 2008, Transfield wrote to Chiping asking for a nomination of the first shipment laycan. No response appears to have come forward. On 16 October, Transfield sent a chaser. On the same day, Chiping replied:

“Dear Mr Yu,

Based on the present freight market and alumina market, we are really not in the position to proceed with the contract you mention below. Please kindly support us and give us your precious understanding.”

31. On 13 November 2008, Transfield’s P & I Club required Chiping to nominate laydays. To that, there was no reply. On 19 November, Transfield asserted that Chiping was in repudiatory breach for failing to provide shipping instructions, which breach it accepted. On 12 December 2008, Transfield commenced arbitration proceedings.
32. In early December 2008, Chiping and Honor Resources agreed to terminate the FOB contract in return for the parties renegotiating future bauxite sales and Chiping agreeing to take a single shipment of 65,000 metric tons of Indian bauxite by 15 January 2009.
33. On 25 December 2008, Chiping appointed an arbitrator under cover of a fax from its lawyers in Beijing which made clear that its position was that there was no binding contract or arbitration agreement.
34. At about the same time, Chiping commenced proceedings before the Qingdao Maritime Court in which it asked the court to adjudicate on whether there was a chartering contract between the parties and sought a declaration that no arbitration agreement existed. That pleading relied on the fact that Chiping’s acknowledgement of the contract expressly stated “*PRO FORMA C/P PER OWNER’S PERFORMED GENCOM C/P*” and “*SUBJS DETAILS*”. Transfield was served with those proceedings on 21 January 2009.
35. On 30 December 2008, there was a meeting between the parties. According to Transfield’s evidence, Chiping suggested that if a lower freight rate could be agreed, they could offer long-term business and at no point did Chiping claim that there was no binding contract.

36. On 19 February 2009, Transfield submitted its objection to the jurisdiction of the Qingdao Maritime Court, relying on the London arbitration provisions in the charter party, as a result of which, as it contended, the Qingdao Maritime Court had no jurisdiction. This was answered shortly thereafter by Chiping in its defence to Transfield's objection, which was submitted on 25 February. Meanwhile, on 23 February, Transfield had served its claim submissions in the arbitration in London.
37. On 3 March 2009, the Qingdao Maritime Court rejected Transfield's jurisdictional objection. It did so without a hearing, although one had been scheduled for 9 March. The terms in which it did so include the following (in translation):
- “After examination, it shows that although the Plaintiff and the Defendant have signed a chartering contract confirmation, the two parties have not reached a consensus on the clauses of the chartering contract. Given that the plaintiff's litigation demand is a demand that requests the Court to rule that the contract between the Plaintiff and the Defendant does not exist, so there exist no arbitration clauses or arbitration agreements between the two parties.*
- The Court considers that since the evidence included in the objection over the jurisdiction the Defendant submitted does not contain clear arbitration clauses or arbitration agreements which the plaintiff has acknowledged by signing, whether the transportation contract between the Plaintiff and the Defendant is valid and whether effective arbitration clauses exist shall be determined by a hearing.”*
38. It is not wholly clear from that translation whether the basis of the decision was that there was no concluded chartering agreement or that, because there was no signed arbitration agreement, the issue between the parties should go to a hearing.
39. In April 2009, the tribunal in the London arbitration ordered that Chiping should serve detailed written submissions on jurisdiction, together with its witness evidence. On 6 May, Chiping did so. Those submissions referred to the Chinese proceedings and suggested that as a matter of case management, it would be preferable to allow Transfield's pending appeal to be determined first.
40. On that same day, Transfield's Chinese lawyers entered an appeal against the ruling of the Qingdao Maritime Court on jurisdiction. On 11 May, Chiping entered its response to that appeal.
41. Transfield served its response to Chiping's written submissions on jurisdiction to the tribunal in London on 7 July 2009. These included witness statements from Mr Yu and Mr Zhang about the events of August 2008. On 1 September 2009, Chiping served its reply submissions on jurisdiction. A hearing has been fixed by the arbitral tribunal for two to three days between 8 and 10 February 2010 to rule on the question of jurisdiction.

42. On 11 November 2009, the Shandong Higher People's Court dismissed Transfield's appeal. The terms in which it did so include the following:

“Although matters concerning the agreement of arbitration clauses were involved in negotiations, the two parties did not sign for acknowledgement. In accordance with the reply and opinion titled of the Supreme People's Court, the arbitration clauses the two parties negotiated on were void because there was no written acknowledgement. As the case relates to disputes arising from contracts for sea transportation of goods and the two parties have only agreed in the chartering contract confirmation that the loading port is a major port in Shandong, China, the Qingdao Maritime Court shall have jurisdiction over the case. The court does not support the appealing reasons of the Appellant.”

43. It seems clear that the Chinese court was deciding that there was no valid arbitration agreement because there was no written acknowledgement of it, as required by Chinese law or perhaps Chinese public policy.
44. On 20 November 2009, Transfield amended its claim submissions in the London arbitration to include a claim for damages for alleged breach of the arbitration clause and for an anti-suit injunction.
45. On 2 December 2009, the parties were notified of the hearing date for the trial of the Chinese proceedings, which had been deferred while Transfield's appeal was being resolved. The first hearing was to take place on 28 December 2009. That may well be the only hearing, although the court may permit further evidence to be heard as a separate hearing if it thinks it appropriate to do so.
46. On a date in December 2009, Transfield asked the arbitral tribunal to expedite the hearing of the jurisdictional dispute so as to have it heard on a date prior to 28 December. Perhaps not surprisingly, the tribunal declined to grant that application because it could not, by that stage, accommodate a two-day hearing within that timeframe.

Breach of agreement

47. If the parties entered into the contract on which Transfield relies, the commencement and continuance of proceedings in the Qingdao Maritime Court is a breach of the arbitration agreement contained in it. Transfield submits that the court can conclude to a high degree of probability that the parties agreed a contract and agreed London arbitration. The manner in which Chiping has conducted itself and what it has said and, as importantly, not said at the relevant time shows that Chiping regarded itself as contractually bound. Transfield seeks a holding injunction for a short time pending the reasoned determination of the arbitrators in order to avoid the serious prejudice it says it will suffer if the question as to whether or not it has a contract is determined not by the London arbitration tribunal that the parties agreed on, applying English law, but by a Chinese court applying the law of the Republic of China.

48. In Transfield's submission, the relevant principles are as follows.

(1) Unless there is a good reason to the contrary, the English court will hold parties to a bargain which they have reached with regard to the jurisdiction in which any disputes between them are to be litigated or determined: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90

(2) The rejection by a foreign court of a jurisdiction challenge is irrelevant to the question of whether or not an anti-suit injunction will issue, unless the foreign court is bound to apply the same principles as the English court and has applied those principles in coming to its decision: see *Akai* and *Schiffahrtsgesellschaft Detlef von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 1 Lloyd's Rep 179).

(3) Where there is a dispute as to whether or not there is a contract at all containing an arbitration agreement, it may be sufficient for the parties seeking anti-suit relief to demonstrate a good arguable case as to the existence of the agreement: see *Youell v Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Rep 102). Even if the test is higher an applicant is required to show no more than that there is a high probability that he is right: see *Bankers Trust Co v PT Jakarta International Hotels & Development* [1999] 1 Lloyd's Rep 910).

(4) The stage which the foreign proceedings have reached is a material consideration to be taken into account when considering whether or not an injunction should issue. However, it remains the case that where there is a clear breach of a jurisdiction clause, whilst an injunction will not issue as a matter of course, it will usually be granted unless some good reason is shown as to why it should not be : see *Akai*.

(5) The present application is not too late. The rejection by the Chinese courts of Transfield's challenge has only lately occurred. The date for the fixture of the trial has also only recently occurred. Only comparatively recently has it become apparent that there will be a trial of the issue as to whether there was a contract in China before the arbitrators rule on their jurisdiction. The balance of convenience is strongly in favour of restraining Chiping from further progressing the Chinese proceedings until the arbitrators have ruled on their own jurisdiction.

49. I accept, broadly speaking, propositions (1), (2) and (4). I say "broadly speaking" because these are general propositions which may have to yield to the particular facts of a particular case.

50. Chiping submits that this application:

- (i) falls well short of the standard required for the granting of an anti-suit injunction, there being, as it claims, a very significant factual dispute as to whether there was an arbitration clause which bound the parties.

- (ii) has been made far too late in circumstances where Transfield has been making applications and pursuing appeals of its own in the proceedings in China.
- (iii) would, if granted, in effect derail a trial which has been listed to begin on 28 December such that the practical effect of the order sought, far from holding the ring, involves aborting the trial at the very last moment.

The test

51. The only basis upon which the court could in this case make an anti-suit injunction is on the grounds that there is, probably is, or arguably is between the parties an agreement which binds them to have their disputes decided in London arbitration. That begs the question as to whether at the interlocutory stage what has to be shown is an arguable case, a strongly arguable case, a case with a high probability of success or a case described by some other adjective or description.
52. In my judgment, the appropriate test is whether or not the applicant has shown on the material adduced at the interlocutory hearing a high degree of probability that there was such an agreement. It is one thing to enforce a clear agreement to arbitrate or one which on an interlocutory basis can be seen to be highly likely to be established. It is another to restrain a party from litigating in a foreign country where the position is less clear than that. The effect of any such order is likely to be final in the sense that if granted until after an arbitral hearing, it will preclude the enjoined party from contending that there was no such agreement otherwise than before the arbitral tribunal and, if the tribunal rules that there was such an agreement, from disputing its existence.
53. Mr O’Sullivan submitted correctly that it is only where the English court can point with confidence to a contractual promise not to litigate elsewhere that it can be justified in interfering with a party’s right to bring its claim in such other place as might accept jurisdiction. There is decided authority to that effect.
54. In *American International Specialty Lines Insurance Co v Abbott Laboratories* [2004] Lloyd’s Insurance and Reinsurance Reports 815, Cresswell J added certain propositions to those set out in the speech of Lord Bingham in *Donohue v Armco* [2001] UKHL 64 in the following terms:
 - “6. *There is no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause. The justification for the grant of the injunction in both cases is that without it the claimant will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy (see The Angelic Grace, [1995] 1 Lloyds Rep 87 at 96, Millett LJ.)*
 - 7. *It would be inappropriate to grant an interlocutory injunction to restrain foreign proceedings at a time when it is no more than arguable that they were brought in breach of contract, because it could not be said that such proceedings were vexatious or oppressive (see Clarke LJ in National Westminster Bank v Utrecht-America Finance Company [2001] 3 All ER (Comm) 7).*

8. *On an application to restrain foreign proceedings brought in (alleged) breach of an arbitration agreement alleged to be governed by English law, the applicant must show to a high degree of probability that its case is right and that it is entitled as of right to restrain the foreign proceedings (see Coleman J in Bankers Trust Co v PT Mayora Indah (20 January 1999, unreported) and Cresswell J in Bankers Trust Co v PT Jakarta International Hotels and Development [1999] All ER (Comm) 785)."*

55. In *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] 2 Lloyd's Rep 411, Teare J said:

"This is a case where an anti-suit injunction is sought at the interlocutory stage of proceedings. However, if the injunction is granted its effect is likely to be final because it will end the Tunisian proceedings and enable the arbitration proceedings to be completed. In such circumstances this court has required the applicant for an anti-suit injunction to establish 'a high degree of probability' that its case against the respondent is right and that it is indeed entitled as of right to restrain the respondent from taking proceedings abroad."

56. Teare J then held that Midgulf's "strongly arguable" case was not sufficient because it ultimately depended on evidence about the content of certain telephone conversations. He said:

"The court is not therefore able to reach the conclusion that Midgulf has established 'a high degree of probability' that its case against GCT, that the July contract included a London arbitration clause, is right and that it is therefore entitled as of right to restrain GCT from taking proceedings in Tunisia. I accept that Midgulf has a strongly arguable case to that effect but that is not sufficient in the present context for the reasons stated in Bankers Trust v Jakarta and American International Speciality Lines Insurance v Abbott Laboratories. That would suggest that the anti-suit injunction granted ex parte on notice by Burton J must be refused."

57. Teare J held, however, that on the particular facts of that case there was doubt as to whether the Tunisian court would decide the question as to whether the relevant contract contained a London arbitration clause. The reason the Tunisian was not prepared to decide that question, in a judgment it had given on GTC's application for a declaration that there was no arbitration agreement between the parties, is not entirely clear but appears to have been either on the basis that the arbitral tribunal itself must decide the question or as a result of a provision of the Tunisian Constitution that the court not decide that question in a declaratory action. In those rather unusual circumstances, Teare J held that the appropriate course on case management grounds was to order a speedy trial of the issues as to the terms on which the July contract was agreed and to continue the anti-suit injunction until then.

58. In *Youell v Kara Mara*, Aiken J (as he then was) adopted the good arguable case test, but the matter appears not to have been the subject of any specific argument.

59. I accept that Transfield has a good arguable case that there is a binding charter party agreement containing a London arbitration clause, but I am not persuaded that there is a high probability of it establishing that that is so. My reasons for that conclusion are these.
60. Firstly, Transfield chose to include in the document which it signed, stamped and tendered for signing and stamping by Chiping the words “*SUBJS DETAILS*”. The effect of that phrase and the various variants and shortened versions of it that exist is well known to the shipping market. It is the maritime equivalent of the more common “subject to contract”, signifying that the agreement in question is not yet intended to be binding, notwithstanding the main terms have been agreed. Generally speaking, there will be no binding contract unless and until the details have also been agreed (see the cases set out in *Wilford on Time Charters* at paragraphs 114 to 199).
61. In *The Junior K* [1988] 2 Lloyd’s Rep 583, Steyn J expressed matters in this way:
- “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.”*
62. Transfield submits that this clause was included in the signed contract by a mistake which it seeks to rectify. Whether it can do that will depend not on the subjective view of either party but on whether what passed between them shows that the signed document mistakenly recorded what they had agreed, which was a contract without the “subject to details” clause.
63. There seems to be only limited material to show that that was so, consisting largely of (i) the formality involved in signing and stamping; (ii) Chiping’s silence when Transfield asserted that there was a clean fixture; and (iii) the communications between the parties when Transfield asserted that there was a contract. The latter do not appear particularly apt to constitute the making of a contract as opposed to an assertion of its existence.
64. Chiping’s evidence is that its representative did not consider the inclusion of the words “*subject to details*” to be a mistake but rather to be a part of a familiar manner of doing business where the main terms were agreed in principle but the contract would remain subject to agreement on the further terms.
65. While Mr Zhang’s subjective belief is not relevant, what happened does not, on an objective basis, appear with any clarity to be inconsistent with that view. The recap was Transfield’s document and Chiping was *prima facie* entitled to take it at face value when deciding whether it should sign it. Further, the exchanges between 3 and 7 August are not couched in the language of variation of an existing contract and are

consistent with the parties seeking to agree the details to which their contract of affreightment was to be subject. Transfield itself seems to have taken the view initially that the better argument was that the contract was agreed on 7 August 2008 rather than 1 August. If the agreement was subject to details, on Chiping's evidence there never was a conclusion of those details.

66. Chiping proposed Hong Kong as the seat for any arbitration. Transfield maintained its preference for London. In doing so, it in effect made to Chiping a counteroffer. The agreement could not then be finalised unless Chiping accepted London arbitration. But it did not. It did not respond at all. However, silence is not, generally speaking, an acceptance.
67. Transfield relies upon the evidence of Mr Yu to the effect that the agreement was reached in a telephone conversation with Ms Chen on 7 August. The content of that conversation is in issue and Ms Chen's evidence, that the decision to go with London arbitration rather than Hong Kong was not one which she had authority to make, has plausibility.
68. Transfield also has a case on estoppel by convention but the only positive conduct to which it can point is the writing of the letters in which Chiping refers to a contract. These were, however, letters written by lay individuals indicating that Chiping was not going to perform any contract of affreightment, which is not a wholly promising basis for a common understanding that there was a binding agreement upon which Transfield relied in a relevant way.
69. Chiping also submits that the reference to "*PRO FORMA C/P PER OWNER'S PERFORMED GENCOM C/P*" does not advance matters. Chiping submits that it purports to be a reference to some specific performed charter party but it is not clear which one is being referred to; it might in 2008 be one or both of the 2005 charters but it is not possible to tell. Transfield may have been referring to some other charter that it had entered into sometime between 2005 and 2008. On this point, it seems highly likely that this should be regarded as a reference to the last GENCOM charter performed between Transfield and Liaocheng.
70. If I am wrong on the conclusion I have reached, which is that the necessary test has not been satisfied and that an anti-suit injunction should be refused upon that ground, it is necessary to consider the question of delay and whether that should or should not affect the grant of injunctive relief.
71. It is well established that, if an application is to be made for an anti-suit injunction, it should be made promptly before the foreign proceedings are too far advanced. In *Verity Shipping SA v NV Norexa (The Skier Star)* [2008] 1 Lloyd's Rep 652, Teare J referred to the familiar statements of principle to that effect. In particular, at paragraph 37 he said:

"In The Angelic Grace Millet LJ said that the English court need feel no diffidence in granting an anti-suit injunction 'provided that it is sought promptly and before the foreign proceedings are too far advanced'. The importance of proceeding without delay was emphasised by Mance J in Toepfer v Molino Boschi [1996] 1 Lloyd's Rep 510. That was perhaps an extreme case where there

had been a delay of seven years in seeking an anti-suit injunction during which time the parties had exchanged exhaustive memoranda under Italian law and procedure regarding jurisdiction, arbitration and the merits. But Mance J's comments illustrate that a party who wishes to enforce a jurisdiction clause should apply promptly once he is aware of a breach of the arbitration clause."

72. Teare J held that this meant that the application to the English court in that case had been made too late.
73. In the present case, Transfield had been aware of the Chinese proceedings since 21 January 2009. Chiping submits that, if an application of the present type was to be made, it should have been made at that stage and not eleven months later.
74. Mr Stephen Phillips, Q.C., submits that although, as is now established, a party who seeks an anti-suit injunction is not obliged to exhaust the process of the foreign court in seeking to get that court to decline jurisdiction, it is entitled to do so. Here, Transfield appealed with a view to getting the first instance decision overruled and securing an appellate court ruling that there was no jurisdiction. It learnt that that appeal was unsuccessful only at the beginning of December 2009, at the same time that it learnt that the trial was to take place on 28 December. Such delay as occurred thereafter, these proceedings having been intimated last Thursday, cannot, he submits, justly cause the court to refuse relief that it would otherwise grant. If one balances the prejudice that Transfield would suffer in not having its rights determined by its chosen tribunal against the minimal prejudice that Chiping may incur if the hearing in China does not take place on 28 December, the balance is, he submits, overwhelmingly in favour of granting relief.
75. I take a different view. It seems to me that it was apparent at the beginning of the year that, in breach of the arbitration agreement if there was one, Chiping was asserting that there was no such agreement and was seeking relief from the Chinese courts on that basis and that the Chinese courts were likely to reach conclusions on the basis of Chinese law, or at least that there was a risk that they might do so.
76. It is suggested that Transfield believed that there was a prospect of Chiping discontinuing its proceedings, but there seems to be no objective basis for that. Once it was aware of the breach, it behoved it, in my view, promptly to seek relief. No doubt in one sense it was entitled to take the matter to appeal but if, as its case, any determination of the disputes between it and Chiping otherwise than in a London arbitration was a breach of its rights, it ran the risk that, unless it sought to invoke those rights in England in a timely fashion, it would be denied discretionary relief.
77. Mr Phillips observed that an anti-suit injunction was something of a legal nuclear weapon and an expensive one at that and that its deployment might be regarded as offensive to the Chinese court such that Transfield should not be criticised or prejudiced in acting in the way it did. In *The Angelic Grace*, Leggatt LJ said:

"For my part, I do not contemplate that an Italian judge would regard it as an interference with comity if the English courts, having ruled on the scope of the English arbitration clause, then

seek to enforce it by restraining the charterers by injunction from trying their luck in duplicated proceedings in the Italian court. I can think of nothing more patronising than for the English court to adopt the attitude that if the Italian court declines jurisdiction, that would meet with the approval of the English court, whereas if the Italian court assumed jurisdiction, the English court would then consider whether at that stage to intervene by injunction. That would be not only invidious but the reverse of comity.

The judge was not deterred from rejecting the approach by The Golden Anne [1984] 2 Lloyd's Rep 489 and in my judgment he was right not to be deterred."

78. That appears to underline the fact that comity, which involves respect for the operation of different legal systems, calls for challenges such as the present to be made promptly in whatever is the appropriate court.
79. As it is, this application comes forward very late in the day in the vacation upon the eve of the trial. I recognise that the immediate cause is the fixing of the trial date, but the problems would have been avoided if an application had been made much earlier, as it should have been in my judgment. This application itself is an *ex parte* application on a notice made in circumstances where time would not permit a regular *inter partes* hearing. In my judgment that is too late and on that ground, also, I decline to make the order sought.