Case Nos: A3/2009/1664, A3/2009/1664(A),
A3/2009/1664(B), A3/2009/1664(C)

Neutral Citation Number: [2010] EWCA Civ 66
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Teare J
2008 Folio 1057, 2009 Folio 192

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2010

Before:
LORD JUSTICE MUMMERY
LORD JUSTICE TOULSON
and
LORD JUSTICE PATTEN
- -

Between:

MIDGULF INTERNATIONAL LIMITED	**Appellant**
- and -	
GROUPE CHIMIQUE TUNISIEN	**Respondent**

- -
- -

Stewart Shackleton, Solicitor advocate (instructed by **Eversheds LLP**) for the **Appellant**
Michael Nolan (instructed by **Salans LLP**) for the **Respondent**

Hearing dates: 19 and 20 January 2010
- -

Judgment

Lord Justice Toulson :

1. The appellant, Midgulf, seeks two orders: an order under s18 of the Arbitration Act 1996 for the appointment of an arbitrator to determine a dispute between itself and the respondent, GCT, relating to a contract made in July 2008 for the sale by Midgulf to GCT of 150,000 mt of sulphur, and an anti-suit injunction to restrain GCT from pursuing parallel proceedings in Tunisia. Both parties contend for the existence of a sale contract, but they differ in their analyses of what were the offer and acceptance and whether the dispute is governed by an English arbitration agreement. The jurisdiction dispute depends on the proper interpretation of a small number of communications between the parties. Teare J concluded that there was no arbitration agreement but he gave Midgulf permission to appeal.

Facts

2. Midgulf is a Cypriot company. GCT is a Tunisian state-owned entity. The origins of the present dispute go back to an earlier contract made between them in June 2008. On 25 June 2008 Midgulf sent to GCT a written offer for sale of 23,000 mt of sulphur for delivery at Gabes Tunisia. The terms of the offer included the following:

> "Buyer to guarantee the draft at Gabes Tunisia to be 32 feet
>
> …
>
> Arbitration. English law to govern. Venue in London.
>
> …
>
> All other terms and conditions as per Midgulf Saudi Arabia standard sales contract."

3. On 26 June 2008 GCT wrote to Midgulf:

> "Further to the above mentioned offer and our subsequent phone exchanges, we are pleased to confirm our agreement to purchase the offered cargo provided the following amendments to your offer:
>
> …
>
> The origin of the cargo is the Kingdom of Saudi Arabia produced by Saudi Aramco quality of which shall comply with GCT standard specifications as per annex 1 herewith attached.
>
> …
>
> The max guaranteed draft at both discharging ports Gabes and Sfax <u>is 31 feet</u> high tide.
>
> …

> Other terms and conditions as per your a/m offer except for its two last lines which must be cancelled."

4. The "two last lines" referred to were the words "all other terms and conditions as per Midgulf Saudi standard sales contract". The evidence was that GCT had not at that stage seen Midgulf's Saudi Arabia standard sales contract.

5. On 27 June 2008 Midgulf sent two faxes to GCT. The longer of the two began "Thanks for your purchase confirmation which we have accepted". The shorter stated:

> "Thank you for your confirmation dated 26th of June, 2008. Kindly find attached the contract signed and stamped by us. Kindly countersign and stamp and send us a copy to the following fax number…"

6. GCT did not sign or return the attached contract.

7. Teare J accepted for the purposes of the applications before him that the June contract was concluded by Midgulf's longer fax dated 27 June, which constituted an acceptance of the GCT's counter offer dated 26 June (but made it clear that his decision was not intended to bind arbitrators appointed in relation to the June contract) and there is no appeal against that conclusion. However, as will shortly appear, the form of contract sent by Midgulf to GCT with its shorter fax dated 27 June is relevant to the question of the existence of an arbitration agreement governing the dispute regarding the July contract.

8. The draft contract, as I will call it, included the following terms:

> "8. Shipment
>
> …
>
> Buyer to guarantee the draft at Port Gabes or Sfax, Tunisia, is 31.00 feet salt water.
>
> …
>
> 10.4.4. Other terms
>
> Buyer guarantees that vessel will be safely accommodated and discharged at discharge port if vessel arrive at a maximum draught of 31 feet…
>
> …
>
> 14. Jurisdiction
>
> This contract is to be construed and governed in all respects in accordance with English law.
>
> 15. Arbitration

English law to govern. Venue in London."

9. On 2 July 2008 Midgulf sent to GCT an offer headed "Crushed sulphur offer for 3rd quarter 2008". The offer (expressed to be "subject reconfirmation") was for the sale of 150,000-mt +/- 10% (seller's option) of sulphur of Saudi Arabian origin at a price of US$ 897 pmt CFR (free out) Gabes or Sfax. The offer included quantity specifications. The period of shipment was expressed to be "July, August, September 2008. Schedule to be agreed in due course."

10. The offer stated that all other terms and conditions pertaining, among other things, to jurisdiction and arbitration were to be "as per our contract no s/s/sulphur/2008/06/27 dated June 27th, 2008".

11. The offer concluded by asking for GCT's acceptance by 3 July.

12. Later that day, after a telephone conversation, Midgulf sent a fax to GCT amending the offer price to US$ 895 pmt and extending the time for acceptance until Monday 7 July.

13. On Friday 4 July there was a telephone conversation, to which I will return, between Midgulf's Chairman and CEO, Dr Dajani and GCT's central manager for the purchases of raw materials, Mr Hamrouni.

14. On 8 July Midgulf sent an email to GCT complaining that "contrary to our oral agreement of sale on last Friday, today it is Tuesday 8/07/2008, and we still haven't received GCT written confirmation for the 150,000 mt sulphur contract". On the same day GCT sent to Midgulf a fax, dated 7 July, as follows:

> "Further to your offer by fax dtd 02/07/08 and further to your fax ref mg/j/2851 dtd 02/07/08, we are pleased to confirm the purchase of 150,000 mt of Saudi crushed lump sulphur at the following conditions:
>
> Product: bright yellow crushed sulphur
>
> Quantity: 150,000 mt +/- 10% (seller's option)
>
> Draft at Gabes and Sfax ports: 31 feet maximum at high tide
>
> Quality specifications: as per your offer by fax dtd July 2nd 2008
>
> Origin: Saudi Arabia
>
> Packing: Bulk
>
> Shipment: July, August, September 2008
>
> Price: USD 895 pmt cfr (free out) Gabes or Sfax (buyer option) to be declared before crossing Suez Canal.

> Consequently, you are kindly requested to submit to us the loading schedule at the rate of probably two vessels per month as well as the name of the performing vessels in July 2008.
>
> We congratulate ourselves for this conclusion and look forward to its smooth execution."

15. Midgulf responded by email dated 9 July:

> "Thank you for your confirmation of acceptance of our offer dated 02/07/2008 per your fax….dated 07/07/2008. Accordingly we are in contract…"

16. On 14 July GCT sent a fax to Midgulf proposing as follows:

> "Subject: Crushed sulphur contract
>
> Further to your fax dtd 27/06/08 enclosing the am contract, please find hereafter our proposed amendments
>
> 14. Jurisdiction
>
> This contract is to be construed and governed in all respects in accordance with Tunisian law.
>
> 15. Arbitration
>
> We suggest that the settlement of disputes to be submitted either to the Tunisian jurisdiction or to the arbitration of the International Chamber of Commerce with the application of a neutral law by both parties."

17. This fax was not addressed to Dr Dajani and did not come to his attention at the time. Meanwhile, on 21 July GCT raised a complaint about the quality of the sulphur delivered under the June contract and on the following day it raised a similar complaint about the first shipment under the July contract, declaring that the contract was therefore "resiliated" and that all its previous confirmations and agreements were null and void.

Legal proceedings

18. At one stage there was a dispute about whether the June contract was governed by an English arbitration agreement, but that has been resolved and English arbitrators have been or are in the process of being appointed.

19. In relation to the July contract, Midgulf served a notice of arbitration on 26 August 2008, but GCT disputed that the contract was governed by English law or by an English arbitration agreement, and so on 13 October 2008 Midgulf issued its application for the appointment of an arbitrator under s18 of the Arbitration Act.

20. On 24 October 2008 GCT issued proceedings in Tunisia seeking a declaration that the July contract was not governed by an arbitration agreement. On 13 November 2008 GCT issued further proceedings in Tunisia for damages under the July contract amounting to the equivalent of approximately £1.9 million, based on non-compliance of the sulphur with agreed quality specifications.

21. On 18 December 2008 GCT issued an application in the Commercial Court to challenge the jurisdiction of the court in relation to Midgulf's application for the appointment of an arbitrator.

22. On 2 February 2009, shortly before there was due to be an oral hearing in Tunisia of GCT's claim in the declaration action, Midgulf gave notice to GCT that it intended to apply for an anti-suit injunction to restrain GCT from pursuing the Tunisian proceedings. At GCT's request, Midgulf gave it until 12 February to decide its response. The Tunisian court heard GCT's claim in the declaration action on 7 February and reserved its judgment.

23. On 13 February 2009 Midgulf issued its application for an anti-suit injunction. The matter came before Burton J for a preliminary hearing on 19 February. After hearing argument for both parties he granted a temporary injunction pending the hearing of Midgulf's application for the appointment of an arbitrator. On 2 March GCT issued an application challenging the jurisdiction of the English court to grant an anti-suit injunction.

24. On 28 March the Tunisian court gave judgment in the declaratory action. It dismissed GCT's application. There are rival English translations of the judgment and rival opinions by Tunisian lawyers about its effect. According to Midgulf's expert, the decision was based on a straight forward application of the doctrine of kompetenz-kompetenz, which led the court to hold that it would be for an arbitral panel appointed under the disputed arbitration agreement to determine its own jurisdiction. In his opinion, GCT's damages claim in respect of the July contract is bound to be dismissed by the Tunisian court for want of jurisdiction. On the other hand, GCT's expert says that the only reason for the failure of the declaratory action was that there was no substantial claim for damages before the court. He is also of the opinion that an appeal by GCT against the first instance decision of the Tunisian court will succeed. It is not for an English court to speculate about GCT's prospects of success before a Tunisian court either in its damages claim or on an appeal from the dismissal of its declaratory claim.

25. Midgulf's applications for the appointment of an arbitrator and the continuation of the anti-suit injunction granted by Burton J came before Teare J on 27 and 28 April 2009. In a reserved judgment, given on 11 May 2009, he concluded that he should only grant an anti-suit injunction if satisfied that there was a high degree of probability that Midgulf's case about the existence of an English arbitration agreement was right, and that this could not be determined without oral evidence from Dr Dajani and Mr Hamrouni about their telephone conversation on 4 July 2008. He therefore ordered that there should be an expedited trial of the issue whether the July contract contained a London arbitration clause, gave directions about evidence and ordered that the anti-suit injunction should continue in the meantime.

26. The trial of the issue took place on 8, 9 and 17 June 2009, at which both Dr Dajani and Mr Hamrouni gave oral evidence. The judge delivered his second reserved judgment on 13 July 2009. He found in favour of GCT, but continued the anti-suit injunction pending the outcome of the present appeal. The Tunisian court has postponed its hearing of GCT's damages claim until after the conclusion of these proceedings.

27. Mr Shackleton, who has appeared for Midgulf on this appeal but did not represent it in the proceeding at first instance, has sought to argue that the judge was wrong to have tried the issue whether the July contract was subject to a London arbitration agreement. He wished to submit that the judge should have done no more than to decide whether there was a good arguable case to support the existence of an English arbitration agreement, for which there was no need to hear oral evidence, and that he should then have ordered the appointment of an arbitrator and granted an anti-suit injunction pending the arbitrator's decision on his own jurisdiction. At the outset of the appeal the court ruled that it was too late for Midgulf to seek to raise such an argument when it had not sought to appeal against the order made by Teare J on 11 May 2009 and the trial of the issue which he had then ordered had taken place.

The judgment of Teare J

28. The Arbitration Act applies only in cases where the arbitration agreement is in writing. An agreement in writing is defined by s5(2) to include an agreement made by exchange of communications in writing or an agreement evidenced in writing. Section 5(3) further provides that:

> "Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing."

29. The judge recorded that Midgulf put its case for the existence of an English arbitration agreement in three ways. They all began with the arbitration clause in the draft contract dated 27 June 2008, which was incorporated in Midgulf's offer of 2 July 2008. The three arguments were that:

> 1. Midgulf's offer of 2 July was accepted orally on 4 July; or
>
> 2. Midgulf's offer of 2 July was accepted by GCT's fax dated 7 July but sent on 8 July; or
>
> 3. the agreement was contained in Midgulf's offer of 2 July, GCT's counter offer by fax dated 7 July and Midgulf's acceptance by email dated 9 July.

30. As to the telephone conversation on 4 July 2008 between Dr Dajani and Mr Hamrouni, the judge found that each of them was an honest witness but that both had sought to reconstruct events and he did not accept the full account given by either of them. He concluded that the best evidence of the conversation was a contemporaneous diary note made by Dr Dajani which read, "confirmed purchase of 150,000 mt CL [crushed lumps] ARAMCO sulphur @ $895 and his fax would follow

on Monday". He found that there was no reference to the terms of the contract apart from subject matter and price, but it was likely that Mr Hamrouni gave the impression that there was no doubt that a confirming fax would be sent and that Midgulf could proceed to nominate vessels.

31. The judge said that he was not persuaded that a reasonable person with knowledge of the relevant background available to both parties would conclude that Mr Hamrouni, when confirming "the purchase of 150,000 mt CL ARAMCO sulphur @$895", was confirming acceptance of the details of the draft contract dated 27 June 2008 to which reference had been made in the offer of 2 July. Such a conclusion would in his view be unreasonable in circumstances where (i) a fax was awaited by 7 July, which would be expected to refer to terms, (ii) not all of the suggested terms had been agreed in relation to the June contract and (iii) the proposed contract was very substantial and much bigger than the June contract. He said:

> "What was confirmed in the telephone call of 4 July was GCT's agreement to purchase 150,000 mt of sulphur at $895 per ton. Such an agreement can be enforceable as an agreement on main terms only, with the detailed terms to be agreed later; see *Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601 at p 619 (principles 4-6). However, if the oral agreement of 4 July was enforceable it did not contain a London arbitration clause."

32. As I read his judgment, this fell short of a positive finding that the effect of the telephone call was to conclude a contract; but he regarded it as a possible interpretation that there was an agreement "on main terms", which did not include a London arbitration clause.

33. The judge found that GCT's fax dated 7 July was not an acceptance of Midgulf's offer of 2 July but a counter offer. He accepted that "the tenor of the language of the fax dated 7 July is strongly suggestive that agreement had been reached and that no further negotiations were required", but he concluded that on proper analysis it was a counter offer for two reasons. First, although GCT's fax purported to confirm the purchase, it did so "at the following conditions". The conditions which followed did not include provisions as to jurisdiction and arbitration or include any reference to the terms of Midgulf's offer of 2 July other than those specifically identified in the fax dated 7 July. In other words, the judge read the words "at the following conditions" as intended to exclude any other conditions referred to in Midgulf's offer. Secondly, the term as to maximum draft in GCT's fax differed from Midgulf's offer because it included the words "at high tide". He said that since GCT was giving a warranty as to the maximum draft the reference to high tide was important.

34. The judge concluded that the counter offer contained in GCT's fax dated 7 July was accepted by Midgulf's fax dated 9 July. A contract was then formed on the conditions set out in GCT's fax dated 7 July and no other terms. The contract therefore did not include a London arbitration clause.

Discussion

35. A major theme of Mr Shackleton's written and oral argument was that it was irrelevant whether the parties entered into a July sale contract and, if so, what were its

terms. All that mattered was whether there was an arbitration agreement relating to the alleged July sale contract. An arbitration agreement is severable from any associated agreement. The judge and the parties failed to grasp this simple point and therefore misdirected their concentration.

36. The severability of an arbitration agreement as a matter of principle is in my judgment irrelevant in the present case and I reject the argument that the judge and the parties were on the wrong track in the way that they approached the issues in the case. The only reference to English arbitration in the communications between the parties during the relevant period was in the part of Midgulf's first fax of 2 July which stated that all other terms and conditions pertaining (among other things) to arbitration were to be as per the draft contract dated 27 June and in clause 15 of the draft contract. In the absence of any subsequent specific reference to the subject of arbitration, Midgulf had to show that GCT accepted its sale offer in terms broad enough to encompass the relevant arbitration clause.

37. I begin with the effect of the telephone conversation between Dr Dajani and Mr Hamrouni on 4 July. In the course of argument the following possibilities were canvassed:

> 1. A reasonable person knowing the background and circumstances would have understood what Mr Hamrouni said as nothing more than an expression of willingness in principle to buy 150,000 mt of sulphur at the price offered, coupled with an indication that the terms of the proposed sale would be addressed in a fax which was to follow.
>
> 2. It did not amount to an acceptance of Midgulf's offer of 2 July, but it did amount to the conclusion of a contract of sale on "main terms", which did not include an arbitration clause.
>
> 3. There was a mutual intention to conclude an oral contract, but it was void for uncertainty.
>
> 4. It amounted to an acceptance of Midgulf's offer including the arbitration clause.

38. The objection to the first interpretation, for which Mr Nolan argued, is that it is not consistent with the finding that Mr Hamrouni confirmed the purchase of the sulphur. Confirmation of a purchase is different from a non-binding expression of willingness to enter into a contract on terms to be discussed.

39. A common ingredient of the other three possible interpretations is that the hypothetical bystander would have understood from the conversation that the parties were intending thereby to conclude some form of contract for the purchase and sale of the sulphur.

40. It is certainly possible for parties to enter into a contract on "main terms", leaving other terms for subsequent negotiation, but the necessary premise is that the parties

have reached agreement on all essential matters. The difficulty about adopting that interpretation in this case is that on the judge's finding the parties only spoke about the quantity of sulphur and the price. There was no discussion, for example, of the specification, time for delivery or payment. It is not commercially sensible to suppose that the parties can have intended to enter into a contract of this size for sulphur of indeterminate quality, to be delivered over an indeterminate period and with no provision about payment. So in advancing his argument in support of this possible interpretation, Mr Nolan was driven to accept that there would have to be implied into the contract some of the terms contained in Midgulf's offer. That led to the obvious question: by what criteria was the hypothetical bystander to determine how much of the package of terms constituting Midgulf's offer was to be taken as accepted, in circumstances where Mr Hamrouni said nothing to indicate that his position was reserved in relation to any particular clause? Mr Nolan recognised the difficulty and was not able to offer any submission except to suggest that GCT must be taken to have accepted whatever offered terms might be found by a court to be necessarily part of that which the parties should be taken to have intended to agree. A consequence of that approach is that neither party would know on what terms it had contracted. Where parties have demonstrably agreed on certain identified terms, sufficient to constitute a contract, it is not beyond the court's power to imply other terms in order to give effect to the agreement. But it is another matter if the parties have not demonstrably agreed on essential terms. Mr Nolan was thus led to argue for the third possible interpretation.

41. I would reject the first and second possible interpretations for the reasons which I have stated. There are arguments to be made for and against the third interpretation, i.e. that the conversation had no legal effect, and the fourth interpretation, that it amounted to an acceptance of Midgulf's offer of 2 July. The argument in favour of the third interpretation is that GCT had not agreed all of the suggested terms in relation to the recently concluded June contract and that it was not reasonable to conclude that Mr Hamrouni was agreeing to those terms for the much bigger July contract when there was no discussion of detailed terms. This commended itself to the judge. Mr Nolan developed the point by reference to various terms in the draft contract of 27 June which had not been accepted by GCT in relation to the June contract and did not marry with GCT's fax of 26 June 2008 (setting out the terms on which GCT was prepared to enter into the June contract).

42. The position at the time of the telephone conversation on 4 July was that GCT had not signed or returned the draft contract of 27 June, nor responded with any comments on it. So the hypothetical bystander would not have known what position GCT would take in relation to it. It might possibly have been argued that by agreeing on price and quantity, but saying nothing about any of the other terms, the parties should be taken by reason of their recent prior course of dealing to be agreeing that the other terms (save as to delivery) were to be as per the June contract. But no such argument was advanced before the judge or on the appeal, and it would not have availed GCT to advance it since the June contract unquestionably contained an English arbitration clause. Moreover, if Mr Hamrouni had intended that the July contract should be on identical terms, mutatis mutandis, as the June contract, it would have been simple to say so.

43. The fourth interpretation is that by confirming the July purchase, without any reservation as to its terms, Mr Hamrouni would have been understood by the hypothetical bystander to be accepting Midgulf's offer. I regard that as a more reasonable conclusion than that the effect of the conversation was too uncertain to amount to any contract at all.

44. Events did not stop, however, with that telephone conversation. To my mind the natural construction of GCT's fax dated 7 July (but sent on 8 July) is that it was a confirmation of the purchase agreement, as it was expressed to be. If it was not intended to be so, but was intended to be a rejection of Midgulf's offer and a counter offer on different terms, it is odd that it should begin by saying that "we are pleased to confirm the purchase…" and conclude with the words "We congratulate ourselves for this conclusion and look forward to its smooth execution". So even if the telephone conversation had not amounted to the conclusion of a contract, which was evidenced and confirmed by this fax, I would construe the fax as an acceptance of Midgulf's offer.

45. As previously explained, two points caused the judge to construe the document as a counter offer. The first was that the fax purported to confirm the purchase "at the following conditions", which did not include all the conditions of the offer. Apart from the reference to the maximum draft, the conditions itemised were the principal commercial conditions and followed the wording of Midgulf's offer. An acceptance does not have to repeat every part of an offer for it to be an acceptance of the full offer. The relevant principle is summarised in Chitty on Contracts, 30th ed (2008), at 2-032:

> "A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer… On the other hand, statements which are not intended to vary the terms of the offer, or to add new terms, do not vitiate the acceptance, even where they do not precisely match the words of the offer…The test in each case is whether the offeror reasonably regarded the purported acceptance "as introducing a new term into the bargain and not as a clear acceptance of the offer"."

As the judge acknowledged, the document did not invite a further discussion of terms, but appeared to treat a contract as having been concluded. In my view the most reasonable interpretation is that this was indeed its effect.

46. The second matter which led the judge to construe the document as a counter offer was a reference to the draft at Gabes and Sfax being 31 feet maximum "at high tide". As to that I would make three observations. First, the provision about maximum draft in Midgulf's offer was contained in the draft contract of 27 June, which was incorporated in the offer of 2 July. Paragraph 10.4.4 of the draft contract referred to a maximum draft of 31 feet but without the additional words "at high tide". This was the only provision of the draft contract to which GCT made reference in its fax dated 7 July. It is a reasonable inference that GCT had considered the draft contract and that this was the only provision that it wished to qualify or clarify. Secondly, as I see it, it was not a point of disagreement but rather a clarification of the terms of the offer. Midgulf's offer of 25 June (relating to the June contract) required "Buyer to guarantee

the draft at Gabes Tunisia to be 32 feet". GCT informed Midgulf in its fax dated 26 June that the maximum guaranteed draft at both Gabes and Sfax was 31 feet at high tide. On the next day Midgulf sent GCT the draft contract, which corrected 32 feet to 31 feet but did not include the words "at high tide". There was room for ambiguity in these circumstances. GCT's fax dated 7 July sought to remove any ambiguity by reminding Midgulf that the 31 feet maximum was at high tide. Thirdly, we were told by counsel that the point about "at high tide" was not argued before the judge and therefore he did not have the benefit of their submissions on it.

47. However I do not think that it matters whether the introduction of the words "at high tide" in the fax dated 7 July should be regarded as merely a clarification of the contract which GCT was writing to confirm or as a counter offer, because Midgulf in its fax of 9 July treated GCT's fax dated 7 July as a confirmation of its offer of 2 July, thereby implicitly confirming that the reference to 31 feet maximum was to be taken as the maximum at high tide. I am not able to construe Midgulf's fax of 9 July, which thanked GCT for its confirmation of its acceptance of Midgulf's offer of 2 July, as intended to be an acceptance of a counter offer by GCT on terms materially different from Midgulf's offer of 2 July.

48. For those reasons I would hold that GCT accepted Midgulf's offer dated 2 July, whether by the telephone conversation of 4 July as confirmed by the subsequent exchange of faxes or simply by the exchange of faxes to which I have referred. It follows that the contract included an English law clause and an English arbitration clause.

Anti-suit injunction

49. Mr Nolan was asked what were GCT's intentions in relation to the Tunisian proceedings if this court were to find that the July contract was governed by an English arbitration clause. He indicated that GCT would wish (a) to pursue its appeal in the declaratory action in the hope of obtaining a ruling from a higher Tunisian court that there was no English arbitration agreement and (b) also to pursue its damages claim on the basis that its substantive claim was not precluded by the judgment given by the Tunisian court of first instance in the declaratory proceedings.

50. The jurisdiction of the English court to restrain a breach of an English arbitration agreement by the commencement or continuation of foreign court proceedings is well established.

51. Mr Nolan submitted that it would not be a breach of the arbitration agreement for GCT to continue to pursue the declaratory action, because that action does not involve directly asking the Tunisian court to determine the parties' rights and liabilities under the July contract.

52. I reject that argument. First, where there is a valid English arbitration agreement, it is repudiatory conduct for one of the parties to ask a foreign court to declare that there is no such agreement. Secondly, even if the action did not technically amount to breach of the English contract, under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do so. The sole purpose of the Tunisian declaratory action is to undermine the efficacy of the English

arbitration agreement, either by paving the way for preventing the enforcement of an arbitral award or by paving the way for continuing with its damages claim in Tunisia or both. Subject to any other objection, Midgulf is properly entitled to say that it is necessary in the interests of justice to prevent GCT from attempting to bypass or derail the arbitration agreement in that way.

53. When the matter was first before Teare J, GCT argued as a matter of discretion that an anti-suit injunction ought to be refused because of delay and because of Midgulf's participation in the Tunisian declaratory proceedings. GCT alleged that this amounted to a voluntary submission to the jurisdiction of the Tunisian court to determine the validity of the arbitration agreement. Teare J did not consider on the evidence that Midgulf had consented to the Tunisian court deciding the question of the validity of the arbitration agreement (its argument before the Tunisian court being that it ought not to do so), nor did he consider that either Midgulf's timing in making its application or the extent of its participation in the Tunisian proceedings were such as to make the grant of an anti-suit injunction inappropriate. By a respondent's notice GCT sought to revisit those matters. I can see no error in the way in which Teare J approached them, but if it is for this court to consider the matters afresh (the judge having subsequently refused the application to continue the anti-suit injunction on other grounds) I would come to the same conclusion.

54. In its respondent's notice GCT raised two other grounds for refusing an anti-suit injunction. The first related to the proper approach to be taken by the English court on an application for an anti-suit injunction concerning a contractual dispute in circumstances where there are two possible putative laws governing the parties' contractual relations. The second related to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the decision of the European Court of Justice in *The Front Comor* [2009] 1 Lloyd's Rep 413.

55. The first argument went as follows:

> 1. When an English court is considering an issue of jurisdiction in relation to a contractual dispute which may be governed either by English law or by a foreign court, it cannot use the putative law to resolve it; by default, it has no choice but to apply its own law.
>
> 2. In considering whether to grant an anti-suit injunction, the court should have regard to the fact that a foreign court, applying the alternative putative law, may reach a different result.
>
> 3. It would not be just to grant an anti-suit injunction when the English court's assumption of jurisdiction was not based on a reasoned comparison of the alternative possible governing laws but on a default rule.
>
> 4. In the present case there is evidence from an expert in Tunisian law that a Tunisian court would consider that

> the July contract was governed by Tunisian law and did not include an English arbitration clause.

56. The first step in the argument is based on the decision of the Court of Appeal in *Dornoch Limited v Mauritius Union Assurance Co Limited* [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep 475. I do not consider that the decision bears the weight which Mr Nolan sought to place on it. Normally speaking, it is a well established principle of English private international law that questions relating to the existence and terms of a contract are governed by the putative proper law. This makes sense. Where, as in this case, a party makes an offer to enter into a contract which is explicitly to be governed by English law, only English law can determine whether the other party's conduct amounted to an acceptance so as to create an English law contract. So much is elementary. In *Dornoch* the facts were complex. The dispute was about the validity of a policy of reinsurance of a Mauritian insurance company. The reinsurers gave to the reinsured notice of avoidance of the policy for misrepresentation and non-disclosure. The reinsurers then sought to bring proceedings in England for a declaration of non-liability. With the permission of Aikens J, the proceedings were served on the reinsured in Mauritius. Shortly afterwards the reinsurers bought a claim against the reinsurers in Mauritius. The reinsurers applied for and obtained, without notice, an anti-suit injunction and anti-anti-suit injunction against the reinsured. The reinsured applied for a stay of the English proceedings, an order setting aside permission to serve the proceedings out of the jurisdiction and an order setting aside the anti-suit and anti-anti-suit injunctions. After an inter parties hearing, Aikens J decided that he could not say that either party had demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case what the proper law was. However, he concluded that there was a good arguable case that the contract was most closely connected to England, and he therefore dismissed the applications to stay the English proceedings and to set aside the permission to serve the proceedings out of the jurisdiction, but he discharged the anti-suit and the anti-anti-suit injunctions. The reinsured appealed. There was no appeal by the reinsurers against the discharge of the injunctions.

57. On the appeal the question was argued which law should be applied in order to determine whether the contract contained a Mauritius jurisdiction clause. In the course of giving the leading judgment, Tuckey LJ said (para 17):

> "Where there is more than one possible putative law (as here) it makes no sense to decide which one to choose by any putative law. At this stage the court has no choice but to apply the law of the forum…"

58. He went on to identify the question which the court had to decide, quoting words used by Parker LJ in *Islamic Arab Insurance Co v Saudi Egyptian American Reinsurance Co* [1987] 1 Lloyd's Rep 315, 317:

> "The question is whether the plaintiffs have a good arguable case that English law is the proper law. If they have, then there is jurisdiction to give leave. It may well be that there is also a good arguable case for some other law being the proper law and, if the action goes forward that case will prevail at the trial. That is not the point, at all events unless it is clear that the

question of proper law cannot be further illuminated at the trial."

59. Mr Nolan founds his argument on Tuckey LJ's statement that where there is more than one possible putative law the court has no choice but to apply the law of the forum. However, that observation has to be seen in its context, which was that the court found it impossible to say that either party had demonstrated with reasonable certainty what the proper law was.

60. I turn to the evidence of GCT's expert, Professor Ben Fadhel, on which GCT relies. He explained in a witness statement why, in his opinion, a Tunisian court applying Tunisian law would hold that the contract between the parties did not incorporate an English arbitration clause but, rather, provided for Tunisian law and jurisdiction. The essential steps in his reasoning are as follows:

1. Under Tunisian law, when an offer indicates a fixed time for acceptance it is revoked if the indication of assent does not reach the offeror within the time he had fixed.

2. GCT's offer of 2 July, as amended by its later fax of the same date, was stated to be valid until mid-day on 7 July.

3. Since GCT did not reply to the offer by that deadline, the offer was treated as revoked.

4. The fax from GCT dated 7 July but sent on 8 July amounted to a new offer.

5. In order for that offer to give rise to a contract, it had to be accepted as it was and without the introduction of any new terms, according to Article 32 of the Tunisian Civil Code which states:

> "The agreement to an offer is considered as similar to this offer when the acceptor says only I accept (without adding any new condition) or when he begins the execution of the contract without making any reserve."

6. Midgulf's fax of 9 July would not be considered an acceptance, applying the requirements of Article 32, but amounted to a new offer.

7. The parties were still in negotiation when GCT sent its fax of 14 July proposing Tunisian law and jurisdiction.

8. The negotiation period came to an end on 18 July when the parties agreed the final terms of a letter of credit covering the first delivery and so began the execution of the contract without further reserve.

9. GCT's proposal of 14 July regarding Tunisian law and arbitration had not been rejected by Midgulf and would be considered by a Tunisian court to be part of the deal.

61. There are two points to make about this analysis. The first is that Professor Ben Fadhel made no reference to the telephone conversation on 4 July. This is understandable at the time of his statement, because it was the subject of hotly contested evidence. But we now have the judge's finding about what was said. I have concluded that it was an acceptance without qualification of Midgulf's offer. After the hearing before Teare J, Professor Ben Fadhel made a further statement, but it did not address the effect of the telephone conversation.

62. The second point is more fundamental. Professor Ben Fadhel explained in his statement how in his opinion a Tunisian court would interpret the communications between the parties applying Tunisian domestic contract law. Midgulf's expert, Maitre Ferchiou, disagreed with Professor Ben Fadhel's analysis but I say no more about the grounds of his disagreement because it would not be appropriate for this court to adjudicate on the point of domestic Tunisian law at this stage. If it were necessary to attempt to adjudicate on a matter of domestic Tunisian law it would be better that the Tunisian court should make such adjudication. However, Maitre Ferchiou also challenged the premise upon which Professor Ben Fadhel advanced his reasoning under Tunisian law. Before setting out his own views on Tunisian domestic law, Maitre Ferchiou said:

> "As a matter of principle, Mr Ben Fadhel's reasoning under Tunisian law is not proper because simply under the contract the parties agreed that it is to be construed and governed in all respects in accordance with English law."

63. The first mention of the possible application of Tunisian law was in GCT's fax of 14 July. Midgulf's offer of 2 July was explicitly an offer to enter into an English law contract. Professor Ben Fadhel offers no explanation why the period of validity of such an offer should be considered through the eyes of domestic Tunisian law; and if the offer to enter into an English law contract was accepted as a matter of English law prior to 14 July, he offers no explanation why a Tunisian court should approach the matter on the basis that no such contract had been concluded.

64. When this problem was put to Mr Nolan, he was forced to accept that prior to 14 July there were not two possible putative laws to consider; there was only one possible putative law. But he argued that matters did not stop there, and that the effect of Professor Ben Fadhel's opinion was that under Tunisian law subsequent events changed the position.

65. As a matter of principle, the question whether an English contract has been amended or discharged by agreement must be a matter for the proper law, i.e. English law. However, as an academic proposition, I can envisage the possibility that the parties to an English contract might enter into a Tunisian contract by which each agreed not to enforce any rights or obligations which they had under the English law contract and instead entered into obligations to be governed by Tunisian law. But that improbable scenario is not the analysis put forward by Professor Ben Fadhel.

66. This is not therefore a case, like *Dornoch*, where the court is unable to identify with any degree of confidence the relevant putative proper law. There is only one possible law for determining whether the parties entered into an arbitration agreement by 9 July, namely English law, as I have concluded that they did. On that premise, there is no plausible case to the effect that the parties nevertheless entered into a subsequent Tunisian agreement by which Midgulf became contractually bound not to enforce its rights under the prior arbitration agreement but to submit instead to arbitration in Tunisia. It is therefore unnecessary to consider what might have been the appropriate course for this court to take in such an unlikely situation.

67. The final point advanced by Mr Nolan in opposition to an anti-suit injunction was put somewhat faintly. He suggested that since the decision of the ECJ in *The Front Comor* the English court should refrain from granting anti-suit injunctions, at least if the foreign country concerned is a party (as Tunisia is) to the New York Convention, which provides in Article II(3):

> "A court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

68. I am unimpressed by that argument. *The Front Comor* was based on the effect of Council Regulation (EC) no 44/2001. English courts have long taken the view that the grant of an anti-suit injunction is not incompatible with the New York Convention and I do not see that *The Front Comor* provides a good reason for taking a different view.

69. Prior to the Arbitration Act 1996 there was widespread commercial concern that courts were interfering too readily with the arbitral process, when one of the reasons for which parties commonly choose arbitration is in order to achieve a swift and final resolution of their dispute. The policy which underlies the limited powers given to the court under the Act militates against Mr Nolan's wider argument that the English court should generally refrain from granting an anti-suit injunction in support of an arbitration clause, even when satisfied that the party concerned is intending to act in clear breach of an arbitration agreement.

Conclusion

70. I would allow the appeal, make an order under s18 for the appointment of an arbitrator and grant an anti-suit injunction to restrain GCT from seeking to continue with the Tunisian proceedings.

Documents for the appeal

71. It would not be right to end this judgment without expressing strong disapproval of the volume of papers with which the court was presented by Midgulf. There were 15 lever arch files. These included 5 volumes of authorities (totalling well over 100 authorities) and 3 files of documents (to which almost no reference was made) in addition to the core bundle. Midgulf's first "skeleton argument" ran to 132 pages.

Longmore LJ, as the supervising Lord Justice, ordered Midgulf to produce a proper summary of its argument. It produced a 15 page summary in which it complained that it was unable to develop its argument in proper detail and referred the court instead to the detailed argument contained in its previous document. The respondent's skeleton ran to 23 pages, about which I make no complaint in the circumstances. Midgulf served a supplementary skeleton argument running to 30 pages, in which it repeated many of its previous arguments and complained that GCT had failed to address in its skeleton argument a number of the arguments advanced by Midgulf in its original skeleton argument. In that respect Mr Nolan had shown good judgment because the matters either did not arise on the appeal or were of peripheral relevance.

72. I am afraid that the case is a grotesque example of a tendency to burden the court with documents of grossly disproportionate quantity and length. It is a practice which must stop. Far from assisting the court, it makes the work of the court infinitely harder. Hours had to be spent reading through Midgulf's voluminous skeleton arguments, and they were largely wasted hours. It will no doubt also have added greatly and unnecessarily to the costs of the appeal.

73. The central issue in this case was a very short one. As I said at the outset of the judgment, it turned on the effect of a small number of communications between the parties. All that the court needed in relation to that issue was to have the documents and a summary of each party's argument, which could have been provided in far less than 10 pages. The ordinary principles of contract law in this area are so well known there was no need for reference to authorities, let alone well over 100 authorities.

74. In *Tombstone Limited v Raja* [2008] EWCA Civ 1444; [2009] 1 WLR 1143 Mummery LJ said:

> "125. Practitioners who ignore practice directions on skeleton arguments (see CPR 52PD paras 5.10 "Each point should be stated as concisely as the nature of the case allows") and do so without the imposition of any formal penalty are well advised to note the risk of the court's negative reaction to unnecessarily long written submissions. The skeleton argument procedure was introduced to assist the court, as well as the parties, by improving preparations for, and the efficiency of, adversarial oral hearings, which remain central to this court's public role.
>
> 126. We remind practitioners that skeleton arguments should not be prepared as verbatim scripts to be read out in public or as footnoted theses to be read in private. Good skeleton arguments are tools with practical uses: an agenda for the hearing, a summary of the main points, propositions and arguments to be developed orally, a useful way of noting citations and references, a convenient place for making cross references, a time-saving means of avoiding unnecessary dictation to the court and laborious and pointless note-taking by the court.

> 127. Skeleton arguments are aids to oral advocacy. They are not written briefs which are used in some jurisdictions as substitutes for oral advocacy. An unintended and unfortunate side effect of the growth in written advocacy (written opening and closing submissions and "speaking notes", as well as skeleton arguments) has been that too many practitioners, at increased cost to their clients and diminishing assistance to the court, burden their opponents and the court with written briefs. They are anything but brief. The result is that there is no real saving of legal costs, or of precious hearing, reading and writing time. As has happened in this case, the opponent's skeleton argument becomes longer and the judgment reflecting the lengthy written submissions tends to be longer than is really necessary to explain to the parties why they have won or lost an appeal.
>
> 128. The skeletal nature of written advocacy is in danger of being overlooked. In some cases we are weighed down by the skeleton arguments and when we dare to complain about the time they take up, we are sometimes told that we can read them "in our own time" after the hearing. In our judgment, this is not what appellate advocacy is about, or ought to be about, in this court."

75. The problem has not lessened, and the present is a particularly egregious example. When Mr Shackleton was asked to explain why the court had been burdened with so many documents and such long skeleton arguments, he explained that it was his intention to provide it with all the written materials which might bear on any point which might arise during the appeal and to provide a full statement of his argument in order that his oral argument could be brief. That may accord with the practice in other jurisdictions, where it is customary for appellate courts to limit the time allowed for oral argument to a short period, but it is emphatically not the proper practice in this jurisdiction.

Lord Justice Patten:

76. I agree.

Lord Justice Mummery:

77. I also agree.