Neutral Citation Number: [2022] EWHC 181 (Comm)

Case No: CL-2021-000071

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 31/01/2022

Before :

MR JUSTICE JACOBS

- -

Between :

DHL PROJECT & CHARTERING LTD **Cla**

- and -

GEMINI OCEAN SHIPPING CO., LTD **Defe**

- -

- -

Charles Holroyd (instructed by **Reed Smith**) for the **Claimant**

Timothy Young QC (instructed by **Holman Fenwick Willan**) for the **Defendant**

Hearing dates: Monday 24th January 2022

- -

Approved Judgment

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

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MR JUSTICE JACOBS

Mr Justice Jacobs:

A: The issue and the applications

1.
The Claimants (“the Charterers”) seek to challenge an arbitration award made by Mr Stuart Fitzpatrick as sole arbitrator (“the arbitrator”) in respect of a claim by the Defendant (“the Owners”) for damages consequent upon (what the arbitrator considered to be) the Charterers’ repudiation of a charterparty. The arbitrator awarded US$ 283,416.21 as damages and made ancillary orders against

the Charterers for the payment of costs. In broad summary, the shape of the parties' arguments are as follows.

2.
The Charterers contend that no binding contract was concluded between the parties, and that there was also no binding arbitration agreement between them. The basis of their argument is that the parties' negotiations towards a charterparty fixture did not reach the stage of a binding contractual agreement in any respect. That was because although the parties had agreed upon the terms of a fixture, the agreement was on "subjects" or "subs", meaning that there were preconditions to contract which remained outstanding. The "sub" or "subject" in question concerned "shipper/ receivers approval". The Charterers contend that this subject was never (to use the terminology frequently used in the charterparty context) "lifted". Since there was no binding contractual agreement in any respect, including no binding arbitration agreement, the arbitrator had no jurisdiction to make the award that he did.

3.
The Charterers' principal application is therefore made under section 67 of the Arbitration Act 1996 ("the 1996 Act"), which is concerned with challenges to an arbitration award on the basis that the arbitrator lacked substantive jurisdiction.

4.
In the alternative, the Charterers seek leave to appeal under section 69 of the 1996 Act. The section 69 application only arises if the section 67 application is unsuccessful. The Charterers contend, in summary, that if the arbitrator did have jurisdiction to decide disputes between the parties, including jurisdiction to decide whether or not a binding contract was concluded, his decision that there was a binding contract was wrong in law because he failed to give proper effect to the "shipper/ receivers approval" subject by wrongly construing it as qualified by other contractual terms.

5.
An application for leave to appeal is usually dealt with by the Commercial Court on the papers, without a hearing. In the present case, however, there is a close connection between the arguments under section 67 and 69. Ultimately, they are both based on the "shipper/ receivers approval" subject. Given this connection, Cockerill J ordered that the leave application (and any appeal) under section 69 should be addressed at the oral hearing of the application under section 67, so that there was one "rolled-up" hearing addressing section 67, the leave application under section 69 and any appeal pursuant thereto.

6.
The critical "subject" provision concerning shipper/receivers' approval was contained in an e-mail containing a fixture "recap". The e-mail was dated 25 August 2020 and was sent by a chartering broker, Ms Jill Wu, to the Charterers. The e-mail concerned the Owners' vessel MV Newcastle Express, and a proposed voyage from Newcastle, Australia to Zhoushan, China in late September 2020. The relevant subject appears in bold text at the start of the e-mail, with clauses 1 – 20 thereafter set out. These opening words are set out below. In the "subject" clause, I have added a word which (as the parties agreed) was missing, and I have also expanded an acronym (again as to which the parties were agreed). More generally in this judgment I have corrected typographical or spelling errors in the recap and expanded certain relevant abbreviations for ease of understanding.

AS PER YOUR AUTHORITY/INSTRUCTIONS, IN LINE WITH NEGOTIATIONS/ EXCHANGES, PLEASED TO CONFIRM HAVING – FIXED MAIN TERMS AS FOLLOWS:

SUBJECT SHIPPER/RECEIVERS APPROVAL WITHIN ONE WORKING DAY AFTER FIXING MAIN TERMS & RECEIPT OF ALL REQUIRED CORRECTED CERTIFICATES/DOCUMENTS

=> RIGHTSHIP INSPECTION WILL BE CONDUCTED ON 3RD/SEPT. OWNERS WILL PROVIDE REQUIRED CERTIFICATES LATEST BEFORE VESSEL SAILING (INTENTION 5/SEP). OWNERS WILL ENDEAVOR TO PROVIDE ALL REQUIRED CERTIFICATES/DOCUMENTS EARLIEST POSSIBLE.

7.
The Charterers contend that:

a.
The effect of the “subjects” was that there was no concluded contract between the parties (neither a charterparty nor an arbitration agreement) unless and until the “subjects” were lifted, which they were not. There was therefore no arbitral jurisdiction. This was the section 67 application.

b.
If, contrary to this, there was a concluded arbitration agreement, then the arbitrator made an error of law in holding that (as a result of provisions in an attached proforma charterparty) that shipper/ receivers’ approval for the purposes of the “subject” could not be unreasonably withheld. This was the section 69 application.

8.
The Owners contend that the parties clearly and expressly agreed to arbitration, and that therefore there was a binding arbitration agreement between the parties. Accordingly, they submit that it was for the arbitrator to decide whether or not there was a binding contract between the parties. The arbitrator had substantive jurisdiction and therefore no challenge under section 67 is permissible. Any challenge to the award must therefore be made under section 69.

9.
The Owners oppose the application for permission to appeal under section 69 on various grounds. Their initial argument is that the requirements for the grant of leave under that section were not satisfied. Any question of law raised by the arbitrator’s decision was not of general public importance. The Charterers therefore had to show that the arbitrator’s decision was “obviously wrong”. The Owners submitted that the arbitrator’s decision was neither obviously wrong nor indeed open to serious doubt.

10.
A feature of the arbitration was that the Charterers did not participate in the case at all. The arbitrator did not therefore have the benefit of any submissions from the Charterers. The Owners submit that this provides a further reason why the court should decline to grant leave to appeal: on the basis that leave to appeal a question of law should only be given (under section 69 (3) (d) of the 1996 Act) if it was “just and proper in all the circumstances for the court to determine the question”. They submit that it is not just and proper for the court to assist, by way of granting leave to appeal, a party which decided not to participate in an arbitration.

11.
The Charterers have, however, provided an explanation as to why they did not participate. This was because the individual with responsibility for the fixture negotiations, their chartering manager Mr James Zhan, failed to advise his superiors in the company that there was a dispute which had been referred to arbitration. This was a breach of his duty. The existence of the arbitration only came to

light accidentally when, after the award had been made, his e-mails were examined for another purpose.

12.
If permission were to be granted, the Owners seek to uphold the award on the basis of the reasons given by the arbitrator and, to some extent, on the basis of other arguments as well.

13.
It was common ground that it was appropriate for the court to address the application under section 67 first. If the award was indeed made in the absence of substantive jurisdiction, then it would be appropriate to set aside the award. The application under section 69 would then become academic.

14.
A section 67 application takes place by way of a rehearing: see Dallah Real Estate v ministry of Religious Affairs [2010] UKSC 46, para [26]. In the present case, the parties agreed that there would be no oral evidence, but that each party would simply rely upon the witness statements that it had submitted. In the event, the parties' arguments have very largely been legal arguments based on undisputed documents, in particular as to the legal effect of the "subject" wording set out above in the context of the recap terms as a whole. Neither side therefore placed any significant reliance, in the context of the section 67 arguments, on the evidence given by witnesses, although reference was made to certain contemporaneous post-recap exchanges described in Section B below.

B: Factual background

15.
In August 2020, the Charterers and the Owners negotiated the terms of a fixture through the intermediary of a broker, M.I.T. Chartering & Agency Co Ltd. The individuals involved were (i) James Zhan, the Charterers' chartering manager; (ii) Jill Wu, the broker; and (iii) an individual who is not identified by name in the documents but who communicated with Jill Wu on Owners' behalf. A number of messages on "WeChat" (the Chinese equivalent of "WhatsApp"), between Ms Wu and the Owners' representative, were exhibited in evidence. Some of the messages from Ms Wu passed on, to the Owners, messages which had been sent by Mr Zhan.

16.
On 25 August 2020, Ms Wu circulated a recap ("the recap") by email. It is common ground that the recap accurately reflected what had been agreed. The main body of the recap contained 20 clauses, preceded by the text set out in paragraph 6 above. Clause 17 provided for arbitration in London, with English law to be applied.

17.
Clause 20, headed "Charter Party" provided:

OTHERWISE AS PER ATTACHED CHARTERER'S PROFORMA C/P WITH LOGICAL ALTERATION

18.
Attached to the recap were the following documents:

(1)
an unsigned 9-page proforma charterparty from 2017 under which Ningbo Marine (Singapore) Pte Ltd was the charterer in respect of a vessel "to be nomination";

(2)

a document entitled “Shipping Terms”, running to 4 pages;

(3)
a document entitled “ISPS Code Compliance Clauses”, running to 5 pages.

19.
In the course of argument, the parties referred to a number of terms within the main body of the recap, and within the unsigned proforma charterparty. The relevant provisions are set out in Section C below. No reliance was placed upon the “Shipping Terms” or the “ISPS” code.

20.
The fixture set out in the recap (or the “putative” fixture, as the Charterers described it) was for a voyage of the “Newcastle Express” (the “Vessel”) carrying coal from Newcastle, Australia to Zhoushan, China (Clauses 5, 7 and 8). The laycan at Newcastle was 21-30 September 2020 (Clause 6). The Vessel was at the time at Zhoushan, and Clause 2 indicated that she was estimated to come free on 5 September.

21.
Owners had only recently purchased the Vessel. The evidence of their solicitor, Mr Poynder of HFW, was that there had been a change of managers as well as ownership. The opening text of the recap indicated that the Owners intended the Vessel to be inspected by Rightship. This was intended to take place on 3 September 2020 before the Vessel sailed from Zhoushan. Approval by Rightship was of great importance to the proposed voyage from Australia to China, as reflected in the fact that Clause 2 of the recap provided that the Vessel should be “RIGHTSHIP APPROVED” and that this was to be maintained for the duration of the voyage. The nature of Rightship, and the importance of obtaining a satisfactory rating from that organisation, is explained in the judgment of Steel J in The Silver Constellation [2008] EWHC 1904, paras [7] – [12].

22.
The communications between the Owners and the broker contained discussion as to the timing of the results of the Rightship inspection. In a WeChat message sent to the broker on 3 September 2020 in the morning, local time, Mr Zhan stated:

“Hi Jill

…

Shippers is not accepting Newcastle Express due to Rightship not rectified, kindly consider this vessel free.

…

Would appreciate owners can keep me posted on they received green light from surveyor, thanks

…

Will send official email for this.”

23.
An e-mail was sent later at 7.14 pm local time on 3 September 2020. Mr Zhan told the broker:

“Jill / James

Further to various talks on skype and telecom, please find below from shippers:

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We prefer not to wait for the said rectification from Owners and please arrange for substitute vessel & provide below in vessel vetting and acceptance process within today.:

- Certificate of Class
- Statement of Compliance with IMSBC Code (covering Group B cargoes including Coal)
- Certificate of Registry
- Complete Certificate of Entry with International Group P&I Club (presently only Confirmation of Cover provided)

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We hereby release the vessel due to Rightship and not holding her any longer. Really appreciate owners' understanding and cooperation in this respect.

Best regards,

James Zhan"

24.
It was common ground that, at the time that these messages were sent by Mr Zhan, the Charterers had not (to use the language frequently used in the context of fixing charterparties, as further discussed below) "lifted" the relevant "subject", namely "shipper/receivers approval". In other words, the Charterers had not provided their confirmation to the Owners that there had been approval either by the shipper or the receivers, so that there was now a "clean" fixture. Nevertheless, the Owners contended at the time, and before the arbitrator, that there was a binding charterparty. Following Mr Zhan's e-mail, the London Club on behalf of the Owners had treated the Charterers as being in repudiation of the charter, and the arbitrator subsequently awarded damages for that repudiation.

25.
There was a suggestion in the written arguments by Mr Young QC on behalf of the Owners, both on the permission application and for the substantive hearing, that the relevant shippers had in fact communicated to the Charterers their approval of the Vessel. This was allied with a submission that "shipper/receivers" did not require approval from both the shippers and the receivers: an approval from either would be sufficient. In my view, however, the clause envisaged that there would be approvals from both the shippers and the receivers. The former were in Australia and were likely to be (as Mr Young submitted) one of the major mining companies, and the latter were in China. The documents in the case contained nothing that could be considered to be an approval by the receivers. Furthermore, there was nothing in the documents, in particular the WeChat exchanges, which contained an approval of the Vessel communicated by the shippers either.

26.

On the contrary, those WeChat exchanges show that the shippers, with whom Mr Zhan was communicating, were awaiting the results of the Rightship inspection prior to communicating any approval. As matters transpired, the shippers decided, prior to giving any approval, that they did not wish to use the Vessel. It may possibly be (as Mr Young suggested in oral argument) that this was opportunistic, and was based upon the way that the market had moved, rather than any importance to be attached to the timing of the Rightship inspection. It is not necessary, however, to make any finding to that effect, and I do not do so. What matters is that there is nothing in the documents which supports the suggestion that there was any approval of the Vessel by the shippers at any stage.

27.
In summary, the relevant exchanges (which were exhibited to the Owners' claim submissions in the arbitration) are as follows.

28.
In the morning of 31 August 2020, the broker (Jill Wu) sought reassurance that the Vessel was still estimated to depart Zhoushan on 5 September, and Owners' answer was: "Sailing about 5/6", i.e. sailing on 5 or 6 September.

29.
Later that day, Owners sent over numerous certificates, after which Jill Wu informed the Owners that the Charterers had said that they had sent the certificates to the shipper and were waiting for the shipper's response, but that the shipper still required "Rightship Qi". Rightship Qi (Quality Index) was the name of the Rightship rating system in use at the time.

30.
At 14:36 hrs on 1 September 2020, Jill Wu forwarded two messages from James Zhan, one saying "… the shippers/terminal still need the rectify from Rightship for acceptance", and the second saying "Kindly inform surveyor on board time and estimate result time".

31.
This prompted a discussion between Jill Wu and Owners as to timings. Owners said that they had booked the inspector to come on board on 3 September, the inspection ought to complete on 4 September and sailing about noon on 5 September is the rough plan. Jill Wu then asked: "So should be able to change Rightship on the website on 4th?". This was a reference to the fact that Rightship's approval ratings would not be issued in the form of formal certificates, but instead would be recorded as an entry or change to information on its website. The Owners' response was that the management company was being conservative and "didn't say that but we are working towards that".

32.
Later that day (1 September), at 16:13 hrs Owners sent over three further certificates, explaining in a subsequent message that these replaced certificates sent earlier which contained errors.

33.
At 14:52 hrs on 2 September 2020, Jill Wu forwarded messages from James Zhan which ask: "Please answer if surveyor can board vessel sooner? Shipper is asking" and "We have been chasing head charterers/shipper to confirm acceptance for the past few days". It is clear that by this time there had been no communication of the shippers' approval, and indeed that the shipper had not yet approved.

34.

At the same time, Jill Wu forwarded to Owners her response to James Zhan, which was to say that Owners completely understood “that Shipper will only confirm after Rightship is completed”. She thanked Mr Zhan and shippers for their patience, adding that: the Vessel was in very good condition; the Owners were confident there would not be a problem; and with a newly handed over vessel “these processes take time”.

35.
Jill Wu then forwarded a message from James Zhan asking Owners to send an email explaining the current status and when it would be rectified. The message from Mr Zhan warned that “Shipper thinks it is dragging too long and is asking us to change vessel. Please send me a formal email”. This message again confirms that there had been no communication of the shippers’ approval. Indeed, the position was quite the reverse – the shipper had clearly not yet approved, and Charterers had said nothing which suggested otherwise or which “lifted” the subject.

36.
This request prompted discussion between Jill Wu and Owners, also on 2 September, as to the schedule to be stated in the email. Jill Wu was by this time “worried about the fall in the market”. She proposed estimating rectification of Rightship records on 4 September and sailing on 5 September, but Owners wanted to estimate sailing as 5-6 September. The email which was actually then sent to James Zhan is not in evidence.

37.
At 18:45 hrs that day (2 September), Jill Wu forwarded a set of exchanges between herself and James Zhan. He had informed her that: “Their last was telling us to substitute tonnage asap” and that “I have passed the email to shippers, if they still cannot take it then I may have to release the ship”.

38.
Following this, Owners asked Jill Wu: “Let me confirm if there is any issue with receiver sub? Just left shipper? And Rightship is the only issue with shipper?”. She replied: “No mention of receiver. Rightship is the only issue with shipper”. Owners then requested her to confirm with James Zhan: “If receiver is clear”. She said: “Let me ask”. Owners said: “We are shipper, receiver sub”.

39.
This latter comment reflected the (correct) understanding of the Owners that the relevant “subject” provision in the recap concerned both (i) the shippers and (ii) the receivers. The exchange as a whole shows that no approvals had yet been received from either the shipper or receiver. Whilst Jill Wu considered that Rightship was the “only issue with shipper”, the Owners recognised that this was something that needed to be confirmed. The correspondence cannot in any event be read as the communication of shippers’ approval (either by the shippers themselves or by the Charterers), since it is clear that any approval would not be given prior to the result of the Rightship inspection being known.

40.
At 09:11 hrs the next morning (3 September 2020), Jill Wu forwarded the message from James Zhan (already quoted above) saying: “Shippers is not accepting Newcastle Express due to Rightship not rectified, kindly consider this vsl free… Will send official email for this”. The official e-mail sent later on 3 September is also set out above. On 4 September, the Owners’ P&I Club asserted that the Charterers were in repudiation.

41.

I agree with the submissions of Mr Holroyd that it is clear from the above messages that the “subject” of shippers’ approval was not lifted, and that the Owners were never in any doubt about this. Owners were well aware that the shipper would not give approval until the Rightship inspection had been satisfactorily concluded. The shipper pressed for a faster schedule for completion of Rightship, and ultimately decided that it did not want to wait for the Vessel. The Charterers communicated to Owners on 3 September 2020 that the Vessel was free, i.e. that the Charterers would not be lifting subjects and the deal had fallen through.

C: The conclusions of the arbitrator

42.
The conclusions of the arbitrator are of limited relevance in the context of the court’s rehearing on a section 67 application. However, contrary to much of the Owners’ argument advanced on the application for leave to appeal (and to some lesser extent in the written and oral arguments at the substantive hearing), there is nothing in the award which suggests that the subject of shippers’ approval, or indeed receivers’ approval, was lifted by the Charterers. That is why the arbitrator’s analysis was, and had to be, a more complex one.

43.
The arbitrator’s conclusion was, in summary, that the “subject” contained in the recap should be read together with clause 20.1.1 (and other clauses within clause 20) of the proforma charter. This is set out in Section D below. The arbitrator did not decide the case on the basis that the subjects had been lifted: that argument had not been advanced, and there is nothing in the award to support it. Rather, he decided that, by reading the “subject” together with clause 20.1.1, the charterparty provided that:

“the approval of the Vessel was “subject shippers/receivers’ approval within one working day after fixing main terms and receipt of all required/corrected certificates/documents such approval not to be unreasonabl[y] withheld.”

(See paragraph 50 of the award, referring back to the Owners’ submission as set out in paragraph 32 of the award).

44.
Having so construed the terms of the recap, the arbitrator awarded damages for repudiation on the basis that the approval had been unreasonably withheld. This was because the arbitrator accepted the Owners’ submission that:

“in circumstances in which the Vessel had not sailed from Zhoushan and they were not yet under an obligation to provide the results of the RightShip inspection of 3 September; the shippers and Charterers’ “release” (euphemism for rejection) of the Vessel “due to RightShip” was not reasonable as required by clause 20.1.1, 20.1.2 and 20.4 of the proforma. The Owners added that neither the Charterers nor the shippers had any other reasonable basis for rejecting the Vessel when they did and that the receivers were never said to have rejected the Vessel, reasonably or otherwise.”

45.
In essence, the arbitrator considered that a cancellation on 3 September was unreasonable in circumstances where (as he said in paragraph 52 of the award):

“As regards the results of the RightShip inspection the Owners’ were not under any obligation to provide these to the Charterers until at the latest by the time the Vessel sailed from Zhoushan with the intention being that she would sail on 5 September”

D: The terms of the recap

46.
The relevant terms of the recap, and the proforma charterparty attached, were as follows. I have already referred to some of these, but it is convenient to repeat them here in context.

47.
The opening words of the recap identified the vessel and the voyage:

RE: MV NEWCASTLE EXPRESS/ DHL – NEWCASTLE/ ZHOUSHAN 21-30/SEP – M'TERM RECAP

48.
This was followed by (in the original print out) 7 lines of text, including in bold the "subject" clause:

AS PER YOUR AUTHORITY/INSTRUCTIONS, IN LINE WITH NEGOTIATIONS/ EXCHANGES, PLEASED TO CONFIRM HAVING – FIXED M'TERM AS FOLLOWS:

SUBJECT SHIPPER/RECEIVERS APPROVAL WITHIN ONE WORKING DAY AFTER FIXING MAIN TERMS & RECEIPT OF ALL REQUIRED CORRECTED CERTIFICATES/DOCUMENTS

=> RIGHTSHIP INSPECTION WILL BE CONDUCTED ON 3RD/SEPT. OWNERS WILL PROVIDE REQUIRED CERTS LATEST BEFORE VESSEL SAILING (INTENTION 5/SEP). OWNERS WILL ENDEAVOR TO PROVIDE ALL REQUIRED CERTS/DOCS EARLIEST POSSIBLE.

49.
There followed 20 clauses. This included a very lengthy clause 2. This identified and described the vessel MV Newcastle Express. Clause 2 included the following:

-FULL ITINERARY: EST OPEN ZHOUSHAN 5TH SEP, ETA NEWCASTLE AROUND 21 SEP 1AGW WP WOG

... RIGHTSHIP APPROVED, CLASSED HIGHEST LLOYDS 100 A1 OR IACS MEMBER EQUIV, AND TO BE SO MAINTAINED FOR THE DURATION OF THE VOYAGE ... VESSEL TO BE ACCEPTABLE TO LOADING TERMINAL, MAX 15 YEARS, SUBJECT TO SHIPPERS/RECEIVERS APPROVAL. FOR VESSELS OF 16-20 YRS AND / OR FOR VESSELS INVOLVED, DURING PAST 24 MONTHS, IN ARRESTS AND/OR CASUALTIES INCLUDING, BUT NOT LIMITED TO, GROUNDING, COLLISION OR BREAKDOWN AND/OR DETENTION BY PSC AND/OR WITH CLASS NOTATION, THEN THE DRY BULK VETTING QUESTIONNAIRE MUST BE COMPLETED AND ACCEPTANCE OF THE VESSEL IS SUBJ. TO CHARTERER'S UNDERWRITER'S ACCEPTANCE, WHICH WILL NOT BE UNREASONABLY WITHHELD.

...

PRIOR TO CHARTERERS LIFTING THEIR SUBJECTS, OWNERS TO PROVIDE CHARTERERS WITH THE SPEED AND BUNKER CONSUMPTION FIGURES WHICH WILL ACTUALLY BE USED TO PROSECUTE THE VOYAGE UNDER THE FIXTURE (I.E. BALLAST/LADEN AND IN PORT WORKING/ IDLE) ALONG WITH A DETAILED ITINERARY BASED ON THIS INFORMATION. THESE FIGURES WILL BE APPLIED TO THE FREIGHT DIFFERENTIAL CALCULATIONS.

- LATEST VERSION OF EAST AUSTRALIAN TERMINAL RULES AND REGULATIONS TO BE INCORPORATED INTO THE CHARTER PARTY. VESSEL'S TECHNICAL SPECIFICATIONS AND PERFORMER VESSEL NOMINATION SHALL BE DONE AS PER TERMINAL RULES AND REGULATIONS.

50.
Clause 17 was headed “CONTRACT LAW AND ARBITRATION FORUM”, and provided for arbitration in London and English law.

51.
Clause 20, headed CHARTER PARTY, provided:

OTHERWISE AS PER ATTACHED CHARTERER’S PROFORMA C/P WITH LOGICAL ALTERATION.

52.
The proforma charterparty contained, as Part I, a front page with 26 boxes and 2 further boxes for signature. It identified the charterers as Ningbo Marine (Singapore) Pte Ltd. It was not for a named vessel. Box 5, where the standard form provided for the insertion of the “Vessel’s name”, provided: “To be nomination”. Other boxes in Part I, such as the vessel’s deadweight and date of expected readiness to load, also stated: “To be nomination”. Box 25 (in contrast to clause 17 of the recap) provided for arbitration in Hong Kong, albeit with English law to apply.

53.
Part II of the proforma contained 19 printed clauses, and a further 15 typed clauses numbered from 20 to 34. The clause on which the Owners, and the arbitrator, placed reliance was Clause 20, which occupied just over 1½ pages of text. Clause 20 was headed: “Nomination”, and continued:

PERFORMING VESSEL

NOMINATION

No vessel was identified – unsurprisingly, since this was a proforma.

54.
The substantive wording of Clause 20 included the following. (The text was capitalised in the proforma).

20.1.1 Minimum 15 (fifteen) days before vessel arrival at the loading port owner to nominate full details of performing vessel including ETA at loading port within mutually agreed 10 days laycan spread; the tonnage of coal to be loaded on board the vessel; and the vessel name along with its particulars, for shipper's and receiver’s approval, which is not to be unreasonably withheld, within two working day.

When the Owner nominates vessel as per clause 20.1.1, it shall advise the full counter-party chain of the vessel to the charterer, including the vessel’s head owners, and all disponent owners and charterers, together with other nomination details required. The charterers shall have the option to reject nominated vessel with reference to any counter-party or lack of full information of the chain.

…

20.1.2 Vessel(s) are to be acceptable to the charterer and always in compliance with the rules and regulations of the loading port nominated by the charterer. Acceptance in accordance with clauses 20.1.4 shall not be unreasonably withheld.

…

20.2 Substitution of vessel (only one chance): The Owner may substitute the nominated vessel …

20.3 Acceptance of vessel: Subject to clause 20.4, the charterer shall notify the owner in writing of the acceptance of a vessel within two (2) business days from the receipt of a vessel nomination in accordance with clause 20.1 or 20.2.

20.4 Rejection of vessel: The charterer may, acting in good faith, reject any vessel within two (2) business day of the receipt of a vessel nomination, including a substitute vessel nomination on reasonable grounds. Where a vessel is rejected, the charterer shall provide reasons for such rejection.

55.
Clause 24 provided:

24. **Certificates** … Owners shall, upon fixing, send copies of all vessel's certificates as follows to the charterer by email/fax.

a) PNI entry certificate

b) Hull & machinery certificate

c) ISPS

d) Class certificate

e) Certificate of registry

f) Safety Management certificate

g) Owners undertaking that there are no unpaid dues by head owners/disponent owners like crew wages, mortgage instalments/payments or any market dues.

h) The necessary other certificate for performance the business (such as full cp chain).

E: Section 67 application: the parties' arguments

The Charterers' argument

56.
On behalf of the Charterers, Mr Holroyd submitted that this was a simple case where the recap did not evidence or give rise to a binding contract. The Vessel was "on subs", and unless and until the subs were lifted, there was no binding contract. This was the meaning and effect of the "subject" provision at the start of the recap. The "subs" were never lifted. This conclusion was supported by the very similar decision of Foxton J in Nautica Marine Ltd v Trafigura Trading LLC (The "Leonidas") [2020] EWHC 1986 (Comm). Although the wording of the "subs" in that case was different, the basis of the decision and the reasoning of Foxton J were equally applicable to the present wording.

57.
The Charterers accepted that, in the present case, the parties had agreed all the essential terms. However, the words used in the "subject" provision showed an intention not to create legal relations unless and until the "subs" were lifted. The familiar phrase "subject to contract" has the effect of negativing any intention to enter into contractual relations until a formal contract document is executed, leaving each party free to withdraw until that happens. The common practice in the chartering market of a vessel being fixed on "subjects" or "subs", as described by Foxton J in The Leonidas, has the same effect. There would be no binding contract until the "subs" were lifted. Here, the recap referred (in Clause 2) specifically to the Charterers "lifting their subjects".

58.
The Charterers also accepted that the section 67 application turned on whether a binding arbitration agreement was concluded, rather than on whether a binding charterparty fixture was concluded. But in the circumstances of the present case, the two stood or fell together. The effect of the "subjects" was that the Charterers were unwilling, until the subjects were lifted, to enter into contractual relations. An arbitration agreement is a contract just as much as a charterparty. In the present case, the "subjects" negatived any intent to agree to Clause 17 of the recap (the arbitration agreement), just as much as they negatived any intent to agree to any other clauses of the recap. Here, the parties, by the express terms used, had decided not to enter into any contract at all. Mr Holroyd relied in this connection on the decision of Eder J in Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The "Pacific Champ") [2013] EWHC 470 (Comm).

59.
Accordingly, there was neither a concluded charterparty not a concluded arbitration agreement, and therefore the award should be set aside.

60.
These conclusions were, in Mr Holroyd's submission, unaffected by the arbitrator's analysis of the "subject" clause as being qualified (in consequence of reading the clause together with Clause 20 and in particular Clause 20.1.2 and 20.4) by a requirement that approval could not be unreasonably withheld.

61.
I note at this point that the parties' written arguments had tended to approach this issue of construction (as to whether the "subject" clause was to be read together with clause 20 of the proforma so as to produce the "unreasonably withheld" qualification) as being the subject-matter of the section 69 application. However, as oral argument progressed, in particular in the light of Mr Young's submissions, it became clear that this construction issue was not distinct from the arguments made on the section 67 application.

62.
The effect of the Charterers' submission was that it did not matter exactly how the "unreasonably withheld" construction argument fitted into the case. This was because the arbitrator was wrong to conclude that the "subject" clause in the first part of the recap was to be read down and qualified in the manner proposed by the Owners in their submissions to the arbitrator. This was in summary because:

(1)
The "subject" qualified the entirety of the Charterers' agreement to the fixture. It therefore qualified all of the terms of the recap. Those terms were only agreed by the Charterers subject to shipper/ receivers' approval.

(2)
One of the terms in the recap was paragraph 20, which provided for the terms of the fixture to be "otherwise" as per the proforma charterparty. The Charterers' agreement to paragraph 20 was itself qualified by the "subject" of shippers/receivers' approval.

(3)
Paragraph 20 in any event itself expressly provided that the terms of the proforma were only incorporated insofar as they did not contradict or detract from the terms in the recap, since it

provided that the proforma terms were “Otherwise” incorporated, with logical amendments, i.e. “otherwise” than as specified in the recap.

63.
Accordingly, Mr Holroyd submitted that the “subject” of shippers/receivers’ approval was therefore “two levels above” the provisions of the proforma in terms of the hierarchy of contractual terms: (i) all of the terms of the recap were agreed “subject to” shipper/receivers’ approval; and (ii) one of the terms of the recap incorporated the terms of the proforma (with logical amendments), but only insofar as not inconsistent with the terms in the recap.

64.
In his written submissions in support of the application for permission to appeal, Mr Holroyd advanced some more detailed arguments in support of these propositions. In particular, he submitted that clauses 20.1.1, 20.1.2 and/or 20.4 in the proforma charterparty all concerned approval of a nominated vessel in the context of the proforma charterparty which (unlike the fixture in the recap) was a charterparty in respect of a vessel to be nominated in the future. Such provisions had no obvious or necessary relevance to an agreement (like the recap) in respect of an identified vessel. At best they would require substantial “logical amendment” (per paragraph 20 of the recap), but on any view they could not detract from the “subject” to which the entire fixture was subject.

The Owners’ argument

65.
The Owners’ starting point was that it was not appropriate or necessary to analyse the “subject” provision at all in the context of the section 67 application. This was because the parties had clearly agreed to arbitrate their disputes in London: see clause 17 of the recap. This agreement had been reached in the context of a recap where, as was common ground, there were no terms left to be agreed. The question of whether there was a binding arbitration agreement was not the same thing as whether there was a binding underlying charter. This was because the “separability” doctrine is well established under English law. An arbitration agreement within a commercial contract (sometimes called the “matrix contract” or the “main” contract) is distinct from the matrix or main contract itself. The invalidity of the latter does not impugn the enforceability of the former.

66.
Mr Young relied in that regard upon the width of section 7 of the 1996 Act. This provides:

“**Separability of arbitration agreement**

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purposebe treated as a distinct agreement.”

67.
In his oral submissions, Mr Young (in emphasising the width of section 7) drew attention to the fact that it referred not only to an arbitration agreement which does form part of another agreement, but also to the case where it “was intended to form part of another agreement”. This encompassed a case where the parties had (as in the present case) clearly agreed on London arbitration, even if they might not have been finally agreed on the existence or terms of the matrix contract (i.e. the charter) itself. This argument led to the conclusion that the question of whether or not the parties had reached final

agreement on the existence or terms of the matrix contract – including in the present case the effect of the "subject" provision – was a matter exclusively for the arbitrator in accordance with the parties' clear agreement on London arbitration.

68.
Mr Young submitted that this conclusion was reinforced by the seminal judgment of the House of Lords in Fiona Trust v Privalov [2007] UKHL 40. That case established that the precise wording of an arbitration agreement was of much less importance than previously thought, so that a presumption of "one stop" dispute resolution is to be applied in interpreting arbitration agreements. Applied to the present case, the parties' agreement on London arbitration meant that they agreed, and must have intended, that any issue as to whether there was a binding charter was for the arbitrator. They cannot have intended that the court should become involved in the resolution of that issue. This conclusion was supported by the provisional views expressed by Gross J in UR Power GmbH v Kuok Oils and Grains Pte Ltd [2009] EWHC 1940 (Comm), para [40]. Mr Young submitted that these views, whilst only provisional and therefore at best obiter dicta, were nevertheless entitled to considerable respect. The Owners relied heavily upon them.

69.
The conclusion that there was a valid arbitration agreement, and therefore that the question of whether there was a binding contract between the parties was a matter for the arbitrator, was supported by consideration of the nature of the "subject" relied upon by the Charterers, as well as the other terms of the charterparty. In his oral submissions, Mr Young emphasised a number of features of the "subject" in the recap when read in the light of the other contractual provisions. It related to the approval of the Vessel by a third party, and there was no reason to think that a third party's approval of the Vessel should impact upon the agreement to arbitrate. Third party approval was unlikely to be regarded as a condition precedent to a contract, as opposed to being a "performance" condition, to use the terminology of Foxton J in The Leonidas. But in any event, a provision for third party approval, in particular third-party approval of a vessel, would not undermine the contracting parties' arbitration agreement. Such approval had nothing to do with the parties' agreement to arbitrate.

70.
In this vein, Mr Young submitted that it was important to consider everything that had been agreed in order to work out the true content of the "subject". In the present case, that included clause 20 of the proforma, as the arbitrator had concluded. This had the effect of qualifying the "subject" at the outset of the recap. This reinforced the conclusion that the parties' clear agreement for arbitration included the resolution of any dispute about the effect of the "subject". As he put it, the "subject of the subject" did not limit the terms of what the parties had agreed to refer to arbitration.

71.
A principal purpose of this general line of argument was, as it seemed to me, to move the case away from the potentially choppy waters of a rehearing as to the effect of the "subject" provision in the recap. Where there is a rehearing under section 67, as Mr Young said, the application is de novo on the facts, and with only limited guidance from the award itself. Mr Young was seeking a potentially safer harbour of a case where the Charterers needed to obtain permission to appeal under section 69, where: the circumstances in which leave to appeal should be granted are limited; any appeal would limit the court to findings of fact made by the arbitrator; and the issue is whether the award was wrong on those facts as a matter of English law.

72.

As described below, a very similar line of argument was advanced unsuccessfully before Eder J in The Pacific Champ. Mr Young reserved the right to contend in a higher court that the case had been wrongly decided. For present purposes, however, he was content to proceed on the basis that Eder J's decision may have been correct on the facts, but he submitted that it was of no application to the present case. This was because, in the present case, the parties were agreed on all the contract terms, and all that was outstanding was the approval of the Vessel by the (third party) shipper. This was not an act or decision of a contracting party at all. In The Pacific Champ, the proposed contracting parties were not agreed in all terms, and the relevant "subject" involved a review by the charterers themselves as a party to the proposed contract: it did not involve the act of a third party at all. Moreover, the case did not involve a proforma charter such as that which was incorporated in the present case.

73.
The separability doctrine, in the context of a clear agreement by the parties to arbitrate any disputes in London, meant that any dispute as to whether the charter as the "matrix" contract was void or concluded as a binding contract was a matter for the arbitrator. The only question was whether the shipper/receivers approval "subject" was a condition of the arbitration agreement as well as (arguably) of the fixture itself. There was no overbearing reason why it should be, particularly bearing in mind that (as is clear from cases such as Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyd's Rep 455 and section 7 of the 1996 Act) questions of voidness or illegality of the matrix contract would not have that effect. A dispute as to whether "subjects" have or have not been lifted, or as to the true effect of the subject provision, was quintessentially a matter on which arbitrators were qualified to rule. Any other view would run counter to the "one stop" adjudication presumption of Fiona Trust. There was no reason in the present case why the charter and the arbitration agreement must stand and fall together.

74.
Accordingly, as Mr Young submitted in writing, the section 67 application could be disposed of without the need to consider or determine whether the main/ matrix contract was or was not concluded. The only question was whether a separable arbitration agreement was concluded, and it clearly was. Accordingly, even if the court were to think that the charter was not finally binding as an enforceable contract, the arbitrator nonetheless had substantive jurisdiction to determine that question and reach the conclusion he did. The section 67 application could not succeed, and therefore the only question was whether permission should be granted under section 69 and (if so) whether the appeal should be allowed pursuant to that section.

75.
Mr Young's written argument had treated the arbitrator's analysis, and his conclusion that the "subject" provision was qualified by "not to be unreasonably withheld", as relevant only to the section 69 application. However, as described above, his oral submissions on the section 67 application did draw upon that line of argument. At all events, and however this line of argument fitted into the case, Mr Young's submission was that the arbitrator's construction of the "subject", read together with the proforma charterparty, was correct.

F: The section 67 application - discussion.

76.
I consider that Mr Holroyd's submissions, as summarised above, provide a correct and compelling analysis of the present case, and broadly speaking, and for the reasons which follow, I accept them.

The legal framework

77.
The legal framework in which a section 67 application arises is analysed in detail by Colman J in Vee Networks Ltd v Econet Wireless International Ltd[2004] EWHC 2909 (Comm), paragraphs [16] – [27]. Those paragraphs, and the relevant legal framework, are in my view accurately summarised in Merkin: Arbitration Law paragraph 5.40 as follows:

"If the issue between the parties is the existence of the arbitration clause itself, as opposed to the main agreement to which it relates, the separability of the arbitration clause and the main agreement under s 7 of the 1996 Act is not significant as the question is jurisdictional only: the arbitrators are able to determine the validity of the clause under the kompetenz-kompetenz principle in s 30 of the 1996 Act, although their ruling is provisional and is subject to full judicial reconsideration under s 67 of the 1996 Act. By contrast, if the issue between the parties is only the validity of the main agreement, with no challenge being made to the validity of the arbitration clause, then the separability principle governs the position and the arbitrators are free to determine the substantive validity question by virtue of s 7 of the 1996 Act."

78.
In the present case, the Charterers challenge the existence of both the arbitration clause itself, and the main agreement to which it relates. They do so on the basis of the same clause – the "subject" provision. Their essential argument is that the effect of that clause was that nothing was binding between the parties: neither a "main" agreement for the charter of the Vessel, nor an arbitration agreement for the resolution of disputes between the parties.

79.
I will need to decide whether that is indeed the effect of the "subject" provision on which they rely in order to reach that conclusion. At the present stage, it is sufficient to note that there is nothing wrong in principle in an argument that a single clause, or indeed a single argument, has the effect of negating both a "main" agreement and simultaneously an arbitration agreement. This is clear from the decision in The Pacific Champ, discussed in more detail below. In paragraphs [35] – [36], Eder J concluded in that case that the questions whether there was a binding fixture and/or a binding arbitration agreement "stand or fall together".

80.
The notion that a contract and an arbitration agreement may stand or fall together is also clearly expressed in the judgment of Lord Hope in paragraph [34] of Fiona Trust:

"So, where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it."

81.
Lord Hope was not there saying that this conclusion would always follow. But it is clear that, depending upon the facts and the particular argument advanced, it may do so. Hoffmann LJ expressed the same idea in the pre-1996 Act decision. In Harbour v Kansa, the issue was whether an arbitration agreement encompassed a dispute where it was alleged that a contract of insurance was void for illegality. The Court of Appeal applied the doctrine of separability and held that it did. At 468, Hoffmann LJ said:

“There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contract party suggest themselves as examples.”

In paragraph [17] of Fiona Trust, he (as Lord Hoffmann) gave some other examples of cases where the “ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid”. In paragraph [18] of Fiona Trust, and perhaps contrary to his view in Harbour v Kansa, he indicated that cases where there was no concluded agreement would not necessarily be an attack on the arbitration agreement.

82.
The question on the section 67 application in the present case, ultimately, is whether the “subject” provision in the recap has the effect for which the Charterers contend; i.e. to prevent the existence of both a “main” agreement and an arbitration agreement. Indeed, this is the question correctly identified in paragraph 21 of Mr Young’s skeleton argument:

“The only question is whether the shipper’s/receiver’s approval ‘subject’ was a condition of the arbitration agreement as well as (arguably) of the fixture itself.”

The effect of the “subject shipper/ receivers approval” provision

83.
The starting point must therefore be for the court to consider and determine the effect of the “subject” provision contained in bold text at the start of the fixture recap. The placement of this provision at the start, and the use of bold text, reflected the importance of this provision. It indicated, in my view, that it qualified everything which followed. That naturally includes the arbitration clause itself.

84.
The contractual significance of a “subject” clause of this kind is clearly explained by Foxton J in paragraph [53] of his judgment in The Leonidas:

“… there is a particular feature of negotiations for the conclusion of contracts for the employment of ships which should be noted. When the main terms for a charterparty have been agreed but the parties have yet to enter into contractual relations, this is generally referred to by shipowners, charterers and chartering brokers as an agreement on “subjects” or “subs”, an expression which signals that there are pre-conditions to contract which remain outstanding. The conclusion of a binding contract in respect of such an agreement is seen as dependent on the agreement of the relevant party or parties to “lift” (ie remove) the subjects.”

85.
Foxton J approved the following passage in Carver on Charterparties 1st edition (2017) at para 2-031:

“The parties may agree the terms of a charterparty and one such term may be a condition precedent that unless and until the condition precedent is satisfied, no binding contract comes into being. In charterparty negotiations, such conditions precedent are often referred to as ‘subjects’ and the satisfaction of those conditions precedents is referred to as ‘lifting the subjects’.”

The 2nd edition (2021) contains the same passage.

86.

Wilford on Time Charterparties (4th edition) para 1.11 (also referred to by Foxton J) is to similar effect, under the heading "Words that negative the intention to contract":

"In practice, parties very often indicate that they do not intend to make a binding contract by saying that their agreement is 'subject to' conditions. To say an agreement is 'on subjects' means that it is not binding until the 'subjects' in question have been 'lifted'. Generally, only when all subjects are lifted does an agreement become a binding contract. At that point, the ship is 'fully fixed'."

87.
I have no doubt that the relevant 'subject' in the present case – namely "shipper/receivers approval" – falls into the category described by Foxton J, Carver and Wilford. The commercial purpose of such a subject is obvious: the charterer does not wish to make a binding contract at all unless and until both shipper and receiver have approved the vessel which the charterer is proposing to use. There may be any number of reasons why the shipper or receiver might decline to do so. These may relate to the quality of the ship, its dimensions or broader commercial considerations including market conditions and freight costs which may still be under negotiation. A charterer will wish to reserve its position fully, in terms of a contractual commitment to the owners, pending receipt of the approvals and (as discussed below) sometimes beyond that time. A binding contract will therefore only come into existence as and when the Charterers communicate to the Owners that the subjects are lifted. As The Leonidas and the textbooks indicate, this is the well-recognised practice in the chartering market. Its application in the present case is even clearer than in The Leonidas, because the recap expressly refers in clause 2 to the Charterers "lifting their subjects".

88.
In the present case, that never happened. The evidence of the WeChat exchanges, summarised in Section B above, indicates that the shippers did not approve. There is no clear evidence that there was any approval by the receivers either, although it seems from the WeChat exchanges that it was the shippers' approval which at the time was the real problem. But in any event, it is clear that there was never any confirmation from the Charterers to the Owners that the subjects had been lifted.

89.
The straightforward conclusion, therefore, is that the contract contained in the recap remained a non-binding contact (or "putative" contract as described by the Charterers) unless and until the Charterers lifted their subject, which they never did. Since there was no binding contract as at 3 September 2020, the Charterers were free to withdraw from the proposed contract, which is what they did.

Separability

90.
I accept that it is still necessary to consider whether the effect of the "subject" is confined to precluding simply the "main" contract, for the carriage of goods under a charterparty, from coming into existence, or whether it also extends to the arbitration agreement of which it was intended to form part. I consider that it does so extend for a number of reasons.

91.
First, the effect of the "subject" is to negate the Charterers' intention to enter into any contract at all, unless and until the subject is lifted. The legal consequence is that, prior to lifting the subject, the Charterers were free to walk away from the proposed contract, since there was no contractual commitment. Given that this is the effect of the "subject", there is no reason to think that the parties

intended any contractual commitment of any kind, including any contractual commitment to arbitration. As the Charterers submitted, the relevant “subject” negatived any intent to agree to Clause 17 of the recap, just as much as it negatived any intent to agree any other clauses of the recap.

92.
Secondly, this conclusion is reinforced by the positioning and use of bold text in the recap itself. The “subject” provision comes prior to any of the contractual clauses which are then set out, whether in the recap itself or in the proforma. The natural interpretation is therefore that the “subject” qualified everything that followed.

93.
Thirdly, whilst the separability doctrine is important and is now enshrined in section 7 of the 1996 Act, the arbitration agreement is not to be regarded as a mini-agreement which is in some way divorced from the “main” agreement which the parties were negotiating. It was part and parcel of the proposed agreement as a whole. The question of separability was recently considered by the Supreme Court in Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38. The question in that case was very different to the present: it concerned the proper law of an arbitration agreement, and the extent to which it should follow the proper law of the “main” agreement. At paragraph [61], in the majority judgment, Lords Hamblen and Leggatt said that:

“…it does not follow from the separability principle that an arbitration agreement is generally to be regarded as “a different and separate agreement” from the rest of the contract or that a choice of governing law for the contract should not generally be interpreted as applying to an arbitration clause.”

At paragraph [62], they said that the “arbitration clause is nonetheless part of the bundle of rights and obligations recorded in the contractual document.”

94.
Applied to the present case, the arbitration agreement was part of the bundle of rights and obligations under negotiation, and all of those rights and obligations were subject to the “subject” clause.

95.
Fourth, this conclusion is also reinforced by the fact that the alleged charter and the alleged arbitration agreement were contained in the same document. This was one of the matters which influenced Eder J’s decision in The Pacific Champ that, in that case, the question of whether there was a binding fixture and/or a binding arbitration stood or fell together: see paragraphs [35 (d)] and [36] of the judgment.

96.
Fifth, I consider that the decision of Eder J, in paragraph [35 (a)] of his judgment in The Pacific Champ,is directly on point as far as the present case is concerned, and is correct. I consider it appropriate to apply the same approach (although I would have reached the same conclusion, for the above reasons, even in the absence of that authority). I do not consider, contrary to Mr Young’s submissions, that this part of the reasoning in The Pacific Champ was obiter. Nor do I think that there is any material difference, for the purposes of deciding whether there was a binding arbitration agreement, between the “subject” under consideration in The Pacific Champ and the “subject” in the recap in the present case. The Pacific Champ is a first instance decision under a different contract, with different terms. It is therefore not in any sense binding upon me. However, I do consider that the approach of Eder J in paragraph [35(a)] was sound, and that it therefore provides valuable guidance

as to how the question in the present case should be answered. It is, however, necessary to understand the argument in The Pacific Champ and its facts in a little more detail.

97.
The Pacific Champ involved a dispute as to whether a charterparty had been concluded between the disponent owners, Hyundai Merchant Marine (HMM), and prospective charterers, American Bulk Transport (ABT). The relevant contract was alleged to have been contained or evidenced in a recap sent by ABT by e-mail on the afternoon of 12 February 2008. That recap contained two "subject" provisions, clauses 12 and 13. The clause that was particularly relied upon by HMM, as negativing the existence of both the charter and the arbitration clause, was Clause 12: "Sub review Owners Head CP BTB".

98.
The arbitrators had held that there was a concluded contract between the parties, and their award was challenged by HMM under sections 67, 68 and 69 of the Act. Eder J conducted the necessary rehearing in relation to the section 67 application. This rehearing involved consideration of a number of different arguments of HMM as to why there was no concluded contract, including HMM's argument as to the effect of the "subject" in clause 12. On that rehearing, HMM's argument that there was no contract prevailed. In fact, they were unsuccessful on the clause 12 argument, but succeeded on a different point which negatived the existence of a binding contract; namely, that there had been no consensus between the parties before or at the time that the second recap was sent.

99.
Before dealing with the factual and legal issues on the rehearing, however, Eder J had to deal with an initial argument by counsel for ABT (Mr Davey) as to the scope of the section 67 hearing that should take place. This submission was set out in paragraphs [32] – [34] of the judgment. The substance of that argument is materially identical, or at least very similar indeed, to the argument on separability advanced by Mr Young in the present case.

"[32] However, on behalf of ABT, Mr Davey submitted that such full rehearing was limited to the jurisdiction issue namely whether there was an arbitration agreement, ie it is not a rehearing of the different (and broader) question as to whether there is also a binding contract for the charter of the vessel. Thus, he submitted that there is an important difference between a binding arbitration agreement and a binding fixture. In particular, Mr Davey submitted that it is to be presumed that the parties intended the tribunal to decide any dispute arising out of the relationship into which they had entered and that the principle of separability in section 7 of the 1996 Act means that the arbitration agreement can only be challenged on grounds which relate directly to the arbitration agreement and not merely to the main agreement: see Fiona Trust & Holding Corporation v Privalov[2008] 1 Lloyd's Rep 254; and that this approach includes questions as to whether the main agreement has come into existence: see paras 10 and 18 per Lord Hoffmann."

100.
Mr Davey relied (as did Mr Young in the present case) upon the decision in UR Power and the principle of one stop adjudication in Fiona Trust. The upshot of ABT's submission was set out in [34]:

"On this basis, Mr Davey submitted that there was here, at the very least, a binding arbitration agreement; that therefore the tribunal had the necessary jurisdiction to determine whether or not there was a binding fixture; and that any challenge under section 67 of the 1996 Act is thus bound to fail."

101.
The factual reason that Mr Davey could make this submission was that the second recap contained a clear provision (clause 10) that English law and arbitration were to apply. The lack of consensus between the parties, which the judge in due course found, did not concern the arbitration clause. The parties were clearly agreed on that.

102.
The argument was rejected by Eder J in paragraph [35] of his judgment. He gave a number of reasons. Amongst the reasons which he gave were the following:

"[35] Although these submissions were advanced by Mr Davey most persuasively, I am unable to accept them broadly for the reasons submitted by Mr MacDonald Eggers QC. In particular:

(a) Item 10 of the second recap – which makes provision for arbitration – is like all of the other terms of the recap, at the very least, conditional on the two subjects contained in Items 12 and 13. Accordingly, if Item 12 was not satisfied (as HMM contends), there can, in my judgment, be no operative arbitration agreement.

…

d) As the alleged charter and the alleged arbitration agreement were, on ABT's case, contained in the same document (namely, the second recap), the submissions advanced by HMM to the effect that there was no binding charter necessarily mean that there was no binding arbitration agreement: see Fiona Trust v Privalov at paras 17 and 34."

103.
Accordingly, in his first reason (paragraph [35 (a)]) Eder J considered that all the terms of the recap, including the arbitration clause, were conditional upon the contractual "subjects". For reasons already given, including the positioning of the relevant subject, I consider that this must be so in the present case as well. The consequence in The Pacific Champ was that if the relevant subject was not satisfied, there would be no operative arbitration agreement. I have already held that the "subject" in the present case was not satisfied. The consequence in the present case is, also, that there was no operative arbitration agreement. In both The Pacific Champ and the present case, the fixture and the arbitration agreement stood and fell together.

104.
This passage cannot be dismissed as obiter. Eder J had to deal with the initial argument as to the scope of the hearing. It was because he rejected that argument that he went on to consider the other issues in the case later in his judgment, including the proper interpretation of clause 12.

105.
The principal ground upon which Mr Young sought to distinguish The Pacific Champ was that the nature of the "subject" in that case was different. It related to a review by the Owners themselves, rather than (as in the present case, as Mr Young submitted) the approval of a third party. As discussed in more detail in paragraphs [111] – [113] below, the decision in The Leonidas shows that it is wrong to regard the "subject" in the present case as being simply the approval of a third party. The "subject" in the present case required the confirmation of the Charterers that it had been lifted. This is not, therefore, a ground of distinction from The Pacific Champ. However, even if that distinction did exist, I do not consider that there is any logical reason why the non-fulfilment of the relevant subject should

lead to a different consequence from the non-fulfilment of the condition in The Pacific Champ: i.e. to produce the result that there is an operative arbitration agreement in the present case.

106.
I do not consider it necessary to discuss at length the provisional conclusion of Gross J in UR Power. Gross J's judgment makes it clear that whether or not there is an arbitration agreement in existence will depend "on the circumstances of the individual case". He was not concerned with a charterparty and the well-known practice, described by Foxton J in The Leonidas, of making a fixture on "subs" or "subjects". The contract which he was considering did not have the "subject" written in bold, prior to the any of the other contractual clauses. I consider that there is a clear answer in the circumstances of the present case. For reasons which I have given, it is essentially the same answer as given by Eder J in paragraph [35 (a)] of his judgment, reinforced to some extent by the reason given in paragraph [35 (d)].

Other aspects of the Owners' argument

107.
Mr Young made wide-ranging submissions as to the effect of the "subject" in the present case. These submissions were ultimately directed at the proposition (summarised above) that there was no reason to construe the "subject" in the present case as negating the existence of an operative arbitration agreement. To some extent, however, they were also, as it seemed to me, directed at the proposition that the "subject" in the present case was not a pre-condition to any contract (including the "main" contract) coming into existence; they were "performance" conditions, to use the Foxton J's terminology in The Leonidas. If this argument were to be accepted, it might provide support for the proposition that there was a binding "main" agreement, and therefore a binding arbitration agreement.

108.
I did not consider that any of these submissions, individually or collectively, provided grounds for reaching a conclusion contrary to the analysis for which the Charterers contended and which I have accepted for the reasons set out above. To some extent, the Owners' principal arguments have already been addressed. I will, however, discuss aspects of the arguments raised, including the submission which sought to draw upon the arbitrator's conclusion that the "subject" was qualified by an "unreasonably withheld" requirement.

109.
Mr Young's submissions placed emphasis on the fact that the parties had agreed on all the terms of their proposed contract: there was nothing outstanding which remained to be agreed. That is true. However, one of those terms, indeed the critical term, was the "subject" at the start of the recap and it is necessary to consider its effect on the overall agreement. The legal effect of that clause, discussed in detail above, is not in my view affected by the fact that there were no other outstanding terms to be agreed. Had there been outstanding issues, that might well have provided an additional reason why there was no binding contract and therefore no arbitration agreement, as was the case in The Pacific Champ itself: see paragraph [35 (c)] of the judgment in that case. But the existence of a consensus on other terms carries the Owners' argument as to the effect of the "subject" no further forward.

110.
Mr Young referred to passages in the judgment of Foxton J (in particular paragraphs [49] and [52]) that not all "subjects" can be easily characterised as conditions precedent to the existence of the

contract, and that each case will depend upon its own individual facts and commercial context. His principal submission was that the “subject” in the present case involved an approval by a third party (the shipper), and that such approvals were more likely to fall within (to use Foxton J’s categorisation) the category of “performance conditions” rather than the category of pre-conditions to a binding contract.

111.
I do not accept this argument. The “subject” in the present case did refer to the approval of a third party – or more accurately the approval of two third parties, namely the shipper and receiver. However, I accept Mr Holroyd’s submission that the approval or lack of approval of the third party was not determinative; because what really matters is whether the Charterers provided a confirmation that the contract was to become binding by “lifting their subjects” as contemplated by Clause 2. The consequence, as Foxton J said at paragraph [54] of The Leonidas, is:

“Where a “subject” is only resolved by one or both of the parties removing or lifting the subject, rather than occurring automatically on the occurrence of some external event such as the granting of a permission or licence, the “subject” is likely to be a pre-condition rather than a performance condition”.

112.
Foxton J returned to this theme in paragraph [79] of his judgment. The relevant “subject” in The Leonidas was the acronym “S/S/R/MGT approval”. It was common ground that this referred to “Stem/ Suppliers/Receivers/Management” approval. Foxton J said that:

“It can be said that the “subject to S/S/R/MGT Approval” rubric in the legal terms involves no more than one subject: the charterer is not bound until it communicates a decision to be bound. However, from a commercial perspective, it signals some of the issues which the charterer will need to resolve before being in a position to “clean fix”. [The charterers’] offer to remove most of those “subjects” was a negotiating signal that the parties were moving closer to a deal but, in contractual terms at least, no more than that”.

113.
Accordingly, it would have been open to the Charterers to lift their subject even if the shipper or receiver had not given their approval, although it is perhaps unlikely that they would have done so. Equally, the Charterers may have decided not to lift their subject notwithstanding the receipt of approval from both shipper and receiver. This would have been legally permissible, even if not morally justified, because there was no binding contract until the subjects were lifted. The important point, as explained by Foxton J in paragraph [55] of his judgment, when discussing the decision in Kokusai Kisen Kabushiki Kaisha v Johnson (1921) 8 Lloyds LR 434, is that the critical question is whether the Charterers had given their confirmation that approvals had been given, rather than whether the approvals had in fact been given. As it is, the position on the facts, as I have said, is that the shippers did not approve, and there is also no evidence that the receivers approved.

114.
Mr Young also sought to distinguish the decision in The Leonidas by arguing that the clause in that case was not exactly the same as that in the recap in the present case. He submitted that Foxton J’s conclusions were impacted by the fact that the first and last of the subjects (“stem” and “management approval”) were clearly both pre-conditions, and that this impacted upon the judge’s approach to the two conditions in the middle (“Supplier” and “Receiver”): see paragraph [57] of The Leonidas. He also submitted that there was a distinction between approval by a “supplier” and a “shipper”. The former

gave rise to some of the difficulties discussed by Foxton J in paragraphs [58] – [60]. The latter is much clearer, particularly in the context of the Australian coal trade where (as Mr Young submitted, albeit without any admissible evidence) it was well-known that there were a limited number of shippers and they all owned the facilities at the loadport.

115.
I did not find this argument persuasive. Whilst there are differences in the wordings as between The Leonidas and the present case, I do not consider that such differences should lead to a different result. Foxton J referred, correctly in my view, to the "general status of such "subjects" in charterparty negotiations" (paragraph [79 (v)]). That extends to "receiver's approval", which was a "subject" in both The Leonidas and the present case. It also extends to "shipper's approval" which, when considering its general status, is not materially different to "supplier's approval". Furthermore, the argument based on wording fails to address a key part of Foxton J's analysis, with which I also agree; namely that the key pre-condition is the lifting of the subject, rather than the giving of approval by the third party.

The effect of the proforma

116.
Mr Young also submitted that it was important to look at all the terms which had been agreed and to ask what the "subject" actually embraced: it was necessary to look at everything agreed in order to work out the true content of the "subject". It was at this stage, in the course of his oral submissions on the section 67 application, that his submissions embraced the "unreasonably withheld" argument which the arbitrator had accepted. In summary, he supported the arbitrator's analysis that the "subject" at the start of the recap needed to be read together with clause 20. He submitted that this was relevant to the true nature of the "subject", and thence to the questions of whether there was an intention to create legal relations and whether there was a binding arbitration agreement.

117.
In my view, the "subject" contained at the start of the fixture recap cannot be construed so as to be qualified, and hence limited, by the provisions of Clause 20 of the proforma. Again, I considered that Mr Holroyd's submissions on this issue, as summarised above, were compelling.

118.
On this question, an important starting point in my view is that the "subject shipper/receivers approval" at the start of the recap was expressed in unqualified terms. The provision identified when the Charterers' confirmation was to be given: within one working day after fixing main terms and receipt of all required/corrected certificates/documentation. However, there was nothing which suggested that there was an obligation on the part of the Charterers to give their approval, or that their decision whether or not to do so was constrained in any way, whether by a requirement of reasonableness or otherwise. Accordingly, on the express language of this "subject", it operated in the way described in The Leonidas. There was no binding contract, and therefore the Charterers were free to withdraw prior to providing their confirmation, even if both shippers and receivers had in fact approved.

119.
I also consider that if the parties had intended to impose criteria relating to the reasonableness of approvals, they could and would have made that clear as part of the bold text. Indeed, in clause 2 of the recap, the parties distinguished (i) between vessels of maximum 15 years and (ii) older and potentially more problematic vessels. The former were subject to "shippers/ receivers approval". For

vessels in excess of 15 years, or which had been involved in problems over the past 24 months, there was an additional requirement of acceptance being “subject to charterer’s underwriter’s approval, which will not be unreasonably withheld”. There was no equivalent “unreasonably withheld” language which qualified the reference to shipper/receivers approval in clause 2, or more importantly in the bold text at the start of the recap.

120.
I agree with Mr Holroyd that the incorporating language of clause 20 cannot lead to the result that the clear unqualified wording of the bold “subject” clause is, in effect, substantially watered down by reference to the proforma. Under clause 20 of the recap, the proforma only comes into play “otherwise”. This means that primacy must be given to the express terms which the parties have agreed in the recap. The terms in the proforma must yield to the recap, rather than vice-versa. This conclusion is reinforced by the words in clause 20 that the charterparty is otherwise as per the proforma “with logical alteration”. Accordingly, when drawing up the charterparty (or when identifying the complete terms of the charterparty if no further document was drawn up), it is the terms of proforma which must “logically” be altered so as to conform with the express terms of the recap, rather than vice-versa.

121.
This is not therefore a case where the approach to construction should be to seek to harmonise the terms of the recap with the terms of the proforma by reading down the former. Even if clause 20 had not expressly given primacy to the recap, the usual approach to construction (in the context of incorporated clauses which are inconsistent with the express terms of the incorporating document) would do so. The general approach is described in the following terms in Lewison: The Interpretation of Contracts 7th edition, paragraph 3.83:

“The terms of the clauses which are incorporated into the parties’ contract may not always be entirely appropriate to the contract into which they are incorporated. The proper approach to interpreting an incorporated document was laid down by the House of Lords in Thomas (TW) & Co Ltd v Portsea Steamship Co Ltd, and by the Court of Appeal in Hamilton & Co v Mackie & Sons. In the latter case, Lord Esher MR took the approach of reading in the whole terms of the incorporated document, and then treating any term which was inconsistent with the incorporating document as insensible and to be disregarded. In the former case, Lord Gorell and Lord Robson approached the matter from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. The two approaches may differ slightly but they usually achieve the same result. The process was described by Buckley LJ in Modern Buildings Wales Ltd v Limmer and Trinidad Ltd as follows:

“Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported.” ”

122.
I therefore agree with the Charterers’ submission that the “subject” was not narrowed or restricted on account of the terms of the proforma.

123.
I also agree with Charterers’ argument that clauses 20.1.1, 20.1.2 and 20.4 are clauses which are directed towards a charter in respect of a vessel to be nominated in the future. They have no obvious

or necessary relevance to an agreement, such as the recap, in respect of a specific identified vessel. It would therefore be surprising if such clauses were to have the significant impact on the clear unqualified wording of the “subject” clause for which the Owners contended. This is particularly the case bearing in mind that the imposition of a “not to be unreasonably withheld” qualification would be a substantial and far-reaching diminution in the width of the “subject”. It would force the Charterers to bear the risk of other parties acting unreasonably. This would be a very considerable commercial imposition, including because the Charterers might not even know the reason for a shipper or receiver’s decision.

124.
I also considered that there was force in Mr Holroyd’s submission that clause 20 is concerned with approval of the vessel, whereas the effect of the “subject” at the start of the recap is concerned with approval of the contract as a whole. What is required, as discussed above, is the lifting of the “subject” by the Charterers giving their confirmation that the contract is now effective. Accordingly, the “subject” provision and Clause 20 address different subject-matters, and therefore should not be melded together.

125.
Since I do not accept the Owners’ analysis of the effect of clause 20 of the proforma, that argument carries the argument in support of a binding arbitration agreement no further forward.

Conclusion

126.
Accordingly, having considered the Owners’ further arguments, my conclusion remains as set out above. In summary, the “subject” at the start of the recap was unqualified, and it was of a character which meant (adopting the words of Foxton J in paragraph 53 of The Leonidas) that the parties had yet to enter into contractual relations of any kind. It meant that the parties would not do so unless and until the “subjects” were lifted. Adopting the words of Carver, unless and until the condition precedent was satisfied, no binding contract came into being. There was no contract at all, including no contract to arbitrate. The arbitration agreement and proposed charterparty stood or fell together. The “subjects” negatived any intent to agree Clause 17 of the recap (the arbitration agreement), just as much as they negatived any intention to agree to any other clauses of the recap.

127.
Accordingly, the Charterers’ application to set aside the award pursuant to section 67 of the 1996 Act succeeds.

G: The application under section 69 of the 1996 Act

128.
In these circumstances, the Charterers’ contingent application under section 69 of the 1996 Act does not arise. Since the question of permission to appeal, and indeed the appeal itself, were fully argued as part of the “rolled-up” hearing, I will set out the conclusions which I have reached on the issues raised. I will do so briefly, bearing in mind that (i) they do not arise for determination unless my conclusion set out in Section F is incorrect, and (ii) there is a very large overlap between the points argued on the section 67 application and the issue raised by the section 69 application.

129.

Had the issue arisen for determination, I would have granted permission to appeal for the following reasons. I consider that Ms Underhill's first witness statement contains a compelling case that the inter-relationship between a "subject" provision in a charterparty recap, and the terms of an incorporated proforma charter – in particular as to whether a recap "subject" should be read together with and thence narrowed or restricted by the terms of an attached proforma charterparty – raises a question of general public importance. This issue arises in the context of a market where it is common for: charterparties to be concluded in fixture negotiations leading to the recap, which sets out the terms agreed; the fixture to contain "subjects"; and for the recap to refer to and incorporate the terms of some other charterparty in a manner similar to clause 20.

130.
It will also be apparent from my discussion of the "proforma" issue in the context of the section 67 case that I consider that the arbitrator's conclusion is at least open to serious doubt. Indeed, I consider that it is wrong, for the reasons given. Accordingly, I would have granted leave pursuant to section 69 (3) (c) (ii).

131.
It is not therefore necessary to consider whether, if there was no question of general public importance, the award was "obviously wrong", so as to justify the grant of leave in any event. I am inclined to think that it was, but in saying so I have some considerable sympathy for the arbitrator who was in the position of hearing only one side of the argument, despite his best efforts to avoid that situation.

132.
This leads to the question of whether leave should be declined on the basis that it is not "just and proper in all the circumstances for the court to determine the question", in view of the non-participation of the Charterers in the arbitration. I consider that leave should nevertheless be granted. The reason that the Charterers did not participate was in essence the misconduct of a member of staff, who should have but did not report the existence of the arbitration claim to his superiors. Had this not happened, it is obvious that the arbitration would have been defended; because the Charterers had a solid legal answer to the claim. After the fortuitous discovery of the arbitration proceedings and award, prompt steps were taken to challenge it. In addition, in circumstances where I have decided (in the context of the section 67 challenge) that the arbitrator's construction of the charterparty was wrong, I consider that the justice of the case points strongly in favour of granting leave to appeal under section 69 in the event that the jurisdiction challenge under section 67 failed.

133.
As far as the appeal itself is concerned, it will be apparent from my discussion of the proforma issue that I consider that the award contains an error of law, as to the construction of the "subject" clause, which was decisive in the arbitrator's decision to award substantial damages to the Owners. Had it been necessary to do so, I would therefore have allowed the appeal and set aside the award under section 69.

134.
Some aspects of the Owners' case sought, in effect, to uphold the award on the basis of arguments which were not advanced before the arbitrator, and which were different to the argument which the arbitrator accepted. The principal argument in this respect was articulated as follows in paragraph 33 of the Owners' skeleton argument:

“[E] ven if it was a condition precedent to the existence of the Charter (as to which see below) the Tribunal’s finding that the shipper’s approval had been given on 1 September 2020, with only the RightShip inspection left, was a finding that the shipper’s approval had been given. As a matter of construction of the recap, the RightShip inspection was not part of the ‘recap subject’ at all, but rather a distinct contractual obligation on the Owners: there was an express distinction in the agreed terms between the ‘shipper’s approval’ and the RightShip inspection. The ‘shipper’s approval’ was to be provided within one working day of fixing main terms and receipt of the ‘required/ corrected certs/ docs’ and that was timeously given on 1 September 2020, as found (para 51). The RightShip inspection was different; it was the subject of separate stipulations in the Charter and indeed there was a separate Owners’ warranty of RightShip approval throughout the voyage (a true ‘performance condition’), but it was also specifically agreed by the parties, on the simple wording of the recap, that it was not going to be performed until 3 September 2020 and thus with the result being known only some time after that, a significant time after the agreement of main terms.”

135.
I do not accept this argument. It is based upon the premise that the arbitrator made a finding that shipper’s approval had been given on 1 September 2020. There was, however, no such finding in the paragraph 51 or indeed anywhere else in the award: see Section C above.

Conclusion

136.
The Charterers’ application to set aside the award pursuant to section 67 of the Arbitration Act 1996 succeeds.