JUDGMENT : Mr Hirst QC: Commercial Court. 19th November 2008

1. This action arises out of the arrest of the "*Kallang*" ("the vessel") at Dakar in Senegal between 11 and 24 March 2005. The Claimants, Kallang Shipping Co. SA ("the Owners"), claim that the arrest at the suit of the receivers, Comptoir Commercial Mandiaye Ndiaye ("CCMN"), was a breach of the express and implied terms of the London arbitration clause incorporated in the contracts of carriage. They contend that the breach was induced or procured by the cargo insurers, Axa Assurances Senegal ("Axa Senegal") against whom they claim damages. They also allege that Axa Senegal interfered with their business relations with CCMN and that both defendants conspired to do these things.

2. This Judgment should be read with the related Judgment in **the *Duden*** [2008] EWHC 2762 (Comm), which I have delivered simultaneously with this Judgment.

The Contractual Framework

3. The vessel is a handy-sized dry cargo Freedom 'tween-decker with a deadweight of 15,097 MT. At all relevant times she was entered with the American Steamship Owners Mutual Protection and Indemnity Association ("the American Club") for P&I risks. She was managed by Trisul Shipping & Trading PVT Limited ("Trisul") of Calcutta in India.

4. On 1 February 2005, the Owners and Brobulk Limited ("Brobulk") entered into a time charter on the NYPE form for a time trip from Montevideo in Uruguay to Dakar and/or Nouakchott in charterer's option at a rate of US$12,000 per day plus a ballast bonus. The time charter party contained the following dispute resolution provision:

5. **45. Arbitration**

(b) LONDON

All disputes arising out of this contract which cannot be amicably resolved shall be referred to arbitration in London. Unless the parties agree upon a sole arbitration, the reference shall be for a Tribunal of two arbitrators, one to be appointed by each of the parties, who will have the power to appoint an umpire if they disagree. The arbitrators and the umpire shall be members of the London Maritime Arbitrators' Association or otherwise qualified by experience to deal with commercial shipping disputes. The contract is governed by English Law and there shall apply to arbitration proceedings under this Clause the terms of The London Maritime Arbitrator's Association current at the time when the arbitration proceedings are commenced.

*82. **Arbitration Small Amounts***

If the amount in dispute does not exceed the amount of US$100,000.00 exclusive of any interest on the amount claimed, the costs of the arbitration, and legal expenses, if any, the Owners and the Charterers agree that the matter should be heard under the Small Claims Procedural 1989 Terms in accordance with LMAA Rules. English Law to apply.

6. Also on 1 February 2005, Brobulk Ltd entered into a voyage charter with Voest-Alpine Intertrading AG on the Gencon form. It was agreed that, in return for payment of freight, the Vessel would load a cargo of bagged rice at Montevideo and carry it to Dakar and/or Nouakchott. The voyage charter contained the following provisions:

*5. **Loading/Discharging Costs** …*

(b) F.i.o. and free stowed/trimmed

The cargo shall be brought into the holds, loaded, stowed and/or trimmed and taken from the holds and discharged by the Charterers or their Agents, free of any risk, liability and expense whatsoever to the Owners.

…

*34. **Owners' Responsibility.***

Mats/dunnage to be supplied up to Master's satisfaction. Vessel will in all cases be held responsible for damage to cargo as a result of insufficient dunnage and materials or caused by water through ventilators or due to leakage of water or oil from pipes or tanks on board occasioned by lack of due diligence in making the vessel seaworthy for the currency this Charter Party. Loading and stowage to be at Masters' discretion and satisfaction.

Owners of the vessel to be responsible for delivery of the number of bags shown in the Bills of Lading.

*39. **Disputes***

All disputes arising out of this Charter Party including General Average shall be referred to Arbitration in London and English Law and practice to be applied. Each party to appoint its own arbitrator.

…

Small Claims Procedure Clause

If the amount claimed is less than US$50,000, then the arbitration shall be conducted by a sole arbitrator and be conducted in accordance with "The London Maritime Arbitrators' Association Small Claims Procedure FALCA (fast and low cost arbitration)".

*49. **P&C Clause:***

Owners are not allowed to disclose the details of this Charter Party and it is to be kept private and confidential.

6. The Vessel proceeded to Montevideo and loaded a cargo of 274,000 50kg. bags of rice, weighing 13,700 metric tonnes in all. On 15 February 2005, agents acting for the Master issued 14 bills of lading acknowledging receipt of the rice cargo in apparent good order and condition for carriage to a West African Port. The bills of lading were on the "Congenbill" form for use with charterparties and provided on their face:

Freight payable as per Charter Party dated Feb/01/2005

On the reverse there appeared, *inter alia*, the following:

i) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

The bills were consigned to the order of Voest-Alpine Intertrading AG.

Sale and insurance of the cargo.

7. Voest-Alpine Intertrading Autriche had agreed to sell 14,000 metric tonnes +/- 10% Uruguayan rice to CCMN for loading on the vessel. Pursuant to this sale contract, the bills of lading were negotiated by Voest Alpine Intertrading AG (after receipt from the shippers) to CCMN. The terms of the sale to CCMN were not made clear in evidence. It is to be presumed that they were on CFR terms, because the cargo was insured by CCMN under an all risks marine insurance policy ("the Policy") issued by Axa Senegal. The Policy provided cover for rice cargoes, to be declared under the policy, shipped from anywhere in the world to Dakar, and insured from the moment they crossed the ship's rail. The Policy was governed by Senegalese law. It also provided as follows (in translation):

It is agreed that shortages to be determined by the difference between the weight of the emptied bags – as increased by sweepings if any – and the weight that they should have been, had same bags arrived sound, this weight being calculated as the average weight of sound bags (full or not) at destination. The losses of quantities are thus arrived at without any other deduction than that of the eventual deductible set out by the particular provisions/conditions.

There does not seem to have been any applicable deductible. The carrying vessels were required to be entered with one of the P&I Clubs or insurance companies listed. Included in the list was the American Club.

8. The policy contained a "beneficiary participation clause", whereby profits were to be shared between Axa Senegal and CCMN. The profit and loss account was to be calculated by adding net premium and net recoveries and salvage recovered by Axa Senegal and subtracting brokerage and management costs, fixed at 50% of net premiums received, and claims paid or reserved. CCMN was entitled to be paid 25% of any profit – Axa Senegal was entitled to retain the balance.

9. The Policy incorporated the "*Police Française D'Assurance Maritime Sur Facultés (Marchandises) Guarantie "Tous Risques*" – i.e. the standard French marine insurance policy conditions for goods (all risks). The conditions included the following (in translation):

Article 15

The insured, its representatives and all the beneficiaries of the insurance must exercise reasonable care with all that relates to the goods. Also, they must take all mitigating measures to prevent or limit damages and losses. In the event that they fail to do so, the insurer can take their place to take such measures as are necessary in the circumstances without acknowledgement that the cover is binding.

Article 16

The assured, its representatives and the beneficiaries of the insurance must equally take all steps to preserve the rights and recourses against carriers and any other third parties responsible and to permit the insurer, if necessary, to engage and pursue any action it deems necessary.

Discharge and Arrest

10. The Vessel was ordered to discharge the cargo at Dakar. The Master gave notice of readiness to discharge at 1900 hours on 3 March 2005. Discharge using 14 double gangs of stevedores was started at 0935 hours on 4 March. It was overseen by a number of cargo surveyors:
    - 3A France SA ("3A") for the Owners;
    - CESAC for the stevedores;
    - CEMS for CCMN;
    - CETEX for Voest-Alpine.

    3A were associated with Cabinet Pruvot, a firm in Dakar who represented the Owners and the American Club. Mme Caroline Latinier (later Paul) was the individual involved.

11. 3A produced a daily summary of the outturn from the vessel as they recorded it and (as they believed) was being recorded by the other surveyors – the surveyors must have compared notes regularly. It is apparent that CEMS and CESAC took a more pessimistic view than 3A. There was a considerable and growing discrepancy in the outturn figures:

Surveyor	Bags torn and missing 8 March 9 March 11 March
3A	130 151 179
CEMS/CESAC	1,448 1,656 2,076
CETEX	944 1,070 1,280

12. On 8 March, Mme Latinier was contacted by Axa Senegal. As she reported to Owners and the American Club the next day:

"Axa would like to be provided with a temporary letter of undertaking in the maximum amount of FCFA 30,500,000 to be replaced by a bank guarantee, amount of which is to be established in the light of final figures. Bills of lading will be transmitted to you shortly. Please note that the cargo is covered by Bs/l 1 to 14.

Their request for guarantee is mainly based on extrapolation of alleged damage/shortage as follows according to their surveyor. …"

Axa Senegal followed up this conversation with a fax requesting a provisional guarantee in the amount of FCFA 30.5 million to be followed by a bank guarantee in an amount to be determined in the light of final outturn figures. The fax attached a number of documents, including the bills of lading, but these were fairly illegible. The estimate of loss assumed that, on final outturn, 785 bags would be torn and 2,740 missing.

13. Mme Latinier advised the Owners and the American Club that the request for a guarantee was not justified for the time being. She recommended that Owners offer a Club letter of undertaking and concluded:

"Generally Axa insist on Competent court to be the Senegalese one. We suggest to try and fight this point also and to try and convince them to accept either competent court, either London jurisdiction [sic]"

She responded to Axa Senegal later on 9 March. She indicated that their extrapolations were not accepted, when there were still over 4,000 m.t. cargo left on board, and that she would revert when she had her clients' instructions. Later on that day she also raised the argument with Axa Senegal that, since the commercial invoice indicated that the cargo had been loaded with an allowance +/- 5%, the current claim for shortage was without legal foundation.

14. On 10 March, Axa Senegal observed that no response had been received to the demand for a guarantee and notified Mme Latinier that, unless it received a favourable reply by midday, the vessel would be arrested. Mme Latinier passed this message on to the American Club and the Owners. In response, Anthony Desbrousses for the Club argued that any shortage was due to shortloading and that:

"The terms of the contract of carriage provide for London Arbitration and Law. The C/P and in particular clause 45 is indeed incorporated in the B/L"

15. In an e-mail to Axa Senegal, Mme Latinier raised these points as instructed and asked that they be discussed with the receivers. She stated that the demand for a guarantee was without legal justification and abusive. Mr Djibril Dia of Axa Senegal responded that the quantity indicated without reservation in the bills of lading was generally regarded as sufficient proof. As regards the arbitration clause he said:

"Concernant la clause d'arbitrage prévue par la charte-partie, elle ne nous est pas opposable, étant etendu que nous ne sommes pas partie á ce contrat"

– i.e. that "we" are not bound by the charterparty arbitration clause.

16. Nicholas Parton, of Jackson Parton, London solicitors, was instructed to act on behalf of the Owners and the American Club. At 1515 hours on 10 March, they faxed a letter to Axa Senegal denying the claims in full but offering, without prejudice, to put up security in the sum requested of FCFA 30.5 million in the usual terms of a Club letter of undertaking answerable to English Law and London arbitration. Jackson Parton contended that London arbitration applied to the bills of lading as provided for in clauses 45(b) and 82 of the (time) charter incorporated into the bills of lading. They threatened to seek an anti-suit injunction in the High Court if there was any attempt to arrest the vessel. A draft letter of undertaking was attached.

17. No reply was received to this offer of security. Axa Senegal instructed Ba & Tandian, a firm of lawyers based in Dakar, to apply on behalf of CCMN to the President of the Tribunal Regional Hors Classe de Dakar to arrest the vessel. The application was made in the morning of Friday 11 March in the form of a written "*Requête aux Fins de Saisie Conservatoire de Navire de Mer*" which sought an order for the arrest of the Vessel "*pour avoir sûreté et paiement*" (for security and payment) of the claim provisionally valued at FCFA 25 million. It was made clear that the application was being made pursuant to the Brussels Arrest Convention of 10 May 1952. The Requête included a draft order prepared by Ba & Tandian. At about 1230 hours, President Kandji made the Order accordingly authorising CCMN:

"*a faire procéder à la saisie conservatoire du navire **"KALLANG"** jusqu'à la mise en place d'une caution bancaire et ce, pour avoir sûreté du paiement de sa creance que nous evaluons provisoirement et sans nul prejudice aus frais et interêts à la somme de 25,000,000 FCFA.*"

– i.e. to arrest the vessel as a security for payment of the claim, pending provision of a bank guarantee in the provisional amount ot FCFA 25 million.

18. Having obtained the order, Ba & Tandian arranged for the *Huissier* (a self-employed professional whose role is similar to that of a bailiff in this jurisdiction) to effect the arrest. The *Huissier* attended on board the Vessel at about 1430 hours. He delivered a *Procès-Verbal de Saisie de Navire*, which he was required to read out aloud to the Master. The terms of the document had been drafted by Ba & Tandian. As part of the *Procès-Verbal*, the *Huissier* demanded payment of FCFA 25 million, in default of which the ship would be arrested. The Master did not pay the sum demanded and the Vessel was therefore arrested by a *Denonciation de Saisie de Navire*. The amount of the bank guarantee Axa required was reduced to FCFA 23 million on 14 March, although it does not appear that the order of the Senegalese court was amended to take this into account.

19. The vessel completed discharge at about 1800 hours on 11 March. Had she not been under arrest, she would have sailed shortly afterwards.

Events leading to the release of the Vessel on 24 March

20. There is a good deal of dispute about exactly what happened during the 13 day period between the Vessel's arrest and release, and I will have to return to this chronology later in this Judgment when I come to consider the witness evidence. What is set out below is a summary of the undisputed events largely taken from the contemporary documents, which, as will be seen, do not tell the full story.

21. The Owners and Jackson Parton were notified of the arrest by Mme Latinier shortly after it had been effected on 11 March. In answer to an e-mailed request from Mme Latinier as to what Axa Senegal was demanding in order for the vessel to be released, Mr Dia replied at 1630 hours:

"*nous vous remercions de metre en place instamment une garantie bancaire pour le compte des armateurs prévoyant l'intervention des "**tribunaux compétents**" comme clause de compétence jurisdictionelle*"

– i.e. "we" require a bank guarantee answerable to the judgment of a competent court.

22. In his initial communication to Axa Senegal, Mr Parton had relied on the time charter arbitration clause, but he suspected there might also be a relevant voyage charterparty in existence. At his request, enquiries were made of Brobulk, the time charterers, and over the weekend it emerged that there was indeed a relevant voyage charterparty with a London arbitration and English law clause. Jackson Parton sought a copy of the recap, or the actual charterparty or the unsigned draft. On 13 March, they were supplied with a working copy of the voyage charterparty (with the freight rates redacted). It was not signed and had not been checked. It was later shown to be an accurate copy of the signed original.

23. At 1338 hours on Tuesday 15 March 2005, Jackson Parton sent a fax to Axa Senegal with a copy of an American Club letter of undertaking "which is at your disposal". The attached letter had been signed on behalf of the Club and offered security up to FCFA 25 million against a final unappealable London arbitration award or High Court judgment. Jackson Parton requested "at this eleventh hour" that Axa Senegal agreed to release the vessel against this security and stated that otherwise they would be proceeding to apply for an anti-suit application at the earliest opportunity.

24. Axa Senegal instructed Maître Erik Schmill of Schmill & Lombrez, a lawyer based in Paris, and asked Mr Parton to get in touch with him. On 15 March Mr Parton sent him a copy of the Court documents that had been filed. These included Mr Parton's first witness statement which relied upon and exhibited the working copy of the voyage charterparty. Me Schmill was notified that the hearing would probably be on the morning of 16 March. This elicited an immediate response Me Schmill protesting at how Mr Parton was acting. He said:

"… It is not correct to say that either Axa Senegal, or anybody else mentioned to you that they request a guarantee which stipulates that Dakar courts would be competent to hear the dispute. We do not know at this stage which are the competent court, and the request is to obtain a bank guarantee to cover decision "to be rendered by competent court or tribunal". This allows for the matter to be heard in London Arbitration if that is the proper forum.

You raise in the documentation you have just sent me that it is unreasonable to request a bank guarantee, however we draw your attention to the following: …

Secondly, we draw to your attention that the reason for Axa Senegal to refuse club letter in this matter is simply because the information available to us establishes that the Standard and Poor ratings of P&I Clubs show the American Club as being for several years BBB – minus (including 2004). We do not consider that a club letter from the American Club can be treated as adequate security compared with a bank guarantee from a first class bank. Standard and Poor make it clear that the American Club is vulnerable to adverse trading conditions.

25. Mr Parton appeared before Cooke J. the next morning (i.e. on 16 March) and applied for an anti-suit injunction. His first witness statement was before the Court. The Defendants were not represented but Me Schmill's protest was very properly shown to the Judge. No proceedings had been issued at that time. In the course of the application, the Judge observed that there could be no doubt that the Commercial Court would accept an American Club letter of undertaking. He went on:

"But I am not sure that is the relevant point, is it? What has happened in Senegal? It was offered there, but the local courts said, "No", and insisted on a Bank guarantee. … Suppose the position was this … The application [in] Senegal was stated clearly to be an arrest for the purposes of obtaining security for a London arbitration. … That would plainly be matter for the Senegal court, would it not, to decide what was the appropriate security? And there would not be a breach of the Arbitration Clause because all they would be seeking to do was to get security in respect of an arbitration. That seems to me the difficulty that you face. If you can satisfy me that what is going on there is not simply a security application, but is an attempt to have a substantive [hearing] then you are plainly entitled to an injunction."

In answer, Mr Parton particularly relied on the application in the *Requête* to the Dakar Court "*pour avoir sûreté <u>et</u> paiement*" (my emphasis) and the *Huissier*'s demand for immediate payment.

26. In his short judgment, Cooke J. said that he was entirely satisfied that the claim in Senegal was not simply a claim for "*saisie conservatoire*" but was a substantive claim for which an arrest of the vessel has been ordered. He granted an anti-suit injunction against Axa Senegal, CCMN and Axa France Assurance S.A. requiring the

discontinuance of the Dakar proceedings and the release of the vessel from arrest upon provision of an American Club letter of undertaking to CCMN by fax.

27. The Order was sent to the Defendants by fax on the afternoon of 16 March. It was not obeyed. But Me Schmill indicated on 17 March that the Axa defendants intended to apply to be removed from the injunction as "they were not parties to any proceedings and are therefore being unjustifiably threatened." He repeated that "the substantive action was not being addressed by the Dakar proceedings and whether an English arbitration tribunal is the appropriate and competent forum". He also contended that bill of lading 14 did not refer to any dated charterparty. On that point, he was swiftly corrected by Mr Parton.

28. On 21 March 2005, Mr Parton wrote to TP Marine Solicitors, who were by now representing the defendants, offering an interim proposal to resolve the dispute. The proposal was that the Club would issue a new letter of undertaking securing an award by a "competent court or tribunal" pending resolution of the issues between the parties. The new letter would lapse if London arbitration was upheld. The original letter would lapse if it was not. There was no reply to this proposal.

29. On 23 March 2008, the Owners applied to Cooke J. for permission to issue and serve a writ of sequestration against the property of Axa Senegal and CCMN and for permission to serve the claim form out of the jurisdiction. Alexander Layton QC represented the Owners. Dominic Happé appeared "on a without notice basis" for all three defendants. The Judge used the hearing as an opportunity to try and secure a solution to the *impasse*. Mr Happé stated that CCMN was insistent on a bank guarantee neutral as to jurisdiction. In a somewhat convoluted submission he said: *"I am not going to say that the American Club is not a club letter that is worth anything"*

This was interpreted by Mr Layton as meaning that no point was being taken as to the creditworthiness of the American Club's security. Mr Happé did not demur and he went on to indicate that his clients would accept a Club letter neutral as to jurisdiction for the period of time it took to put up a bank guarantee.

30. In his judgment, Cooke J. held that Owners had a good arguable case that the proceedings in Senegal were not by way of security only and were substantive proceedings. He gave permission for service of the proceedings out of the jurisdiction. After further discussion with counsel, it was agreed, by way of undertakings to the Court, as recorded in the Order made on 23 March, that:

(1) The American Club would undertake either to make a cash payment or procure a bank guarantee in Senegal if it were later held that the Owners were not entitled "to restrain [CCMN's] reliance on the Order of the President of [the Dakar Court] in Senegal dated 11th March 2005";

(2) CCMN would forthwith secure the release of the Vessel from arrest.

31. As a result of the Judge's skilful brokering of a solution, the American Club issued a "competent court or tribunal" letter of undertaking in the amount of CFCA 25 million and the Vessel was finally released from arrest at 1540 hours on 24 March.

The Hearing before Mrs Justice Gloster

32. On 26 and 27 June 2006, a hearing took place before Gloster J. at which the three Defendants applied to set aside the injunction granted by Cooke J. on 16 March 2005 and the order permitting service out of the jurisdiction. There were further written submissions. In her judgment delivered on 7 November 2006 [2006] EWHC 2825 (Comm); [2007] 1 Lloyd's Rep 160, Gloster J set aside the proceedings against Axa France but otherwise upheld the injunction and the order for service out. For the purposes of that hearing only, it was accepted by Mr Layton that the Order in Dakar was an order for security only and that it was not of itself a breach of the arbitration clause to arrest the vessel in Dakar for the purpose of obtaining security, but he submitted that Axa Senegal and CCMN had invoked the Senegalese jurisdiction not merely to obtain security, but for the purposes of obtaining payment. They were acting in a manner designed to ensure that the substance of the claim was litigated in Senegal and to circumvent or frustrate the arbitration clause. He relied heavily on the *Huissier*'s demand for immediate payment.

33. The Judge held:

"35. In my judgment the evidence does show, to the standard of a good arguable case that the first and second defendants were attempting to use the security proceedings in Dakar, and the requirements of a bank guarantee issued by a Senegal bank, as a means of avoiding or frustrating the London arbitration proceedings. If the full picture, as it has emerged before me, was known at the time of the first injunction granted by Cooke J, and I include in the definition of "full picture" the characterisation of the Dakar court's order as an order made by way of security, it is probable that an injunction would nonetheless have been granted by Cooke J. That was because the conduct of CCMN and Axa Senegal, and their refusal to accept a Club letter of undertaking in relation to this cargo claim was effectively frustrating the claimant's contractual entitlement to have that dispute resolved by way of London arbitration. The clear impression that this court would have gained from the evidence is that the defendants were seeking, whether by their use of the security proceedings or otherwise, to have the cargo claim resolved in Senegal.

36. In my judgment, (a) although the English court would not, and could not, have restrained the defendants from applying for the arrest of the vessel in order to obtain security for their claim in Senegal, if no adequate security had been forthcoming, and (b) although ultimately it is a matter for the arresting court to decide the terms of the security, that it is reasonable for the respondent to the arrest application to provide, nonetheless, in the

circumstances, an English court would have restrained the first and second defendants, by way of personal injunction:

(i) from insisting before the Dakar court on a form of security to be provided by the claimant, in order to allow the arrest to be lifted, that required resolution of the cargo claim in Senegal, whether directly or indirectly;

(ii) from putting forward submissions to the Dakar court that the only reasonable security which the Dakar court should accept to prevent release of the vessel was a bank guarantee which required resolution of the cargo dispute in, and subject to, Senegalese jurisdiction;

(iii) from contending before the Dakar court that only a Senegalese bank guarantee was acceptable security, in circumstances where the American Club had offered its letter of undertaking (since the effect of such a submission would, if not inevitably, at least probably, have brought about delay at best and resolution of the cargo claim in Senegal at worst).

In my judgment, such an approach by the English court would have been perfectly consistent with the principle, as recognised in the Brussels Convention, that it is for the arresting court, where the vessel is present and situate, to decide on the appropriate nature of the security and would have not offended any notions of comity. The English court would not have been trespassing on the jurisdiction of the Dakar court; rather the former would have been exercising its undoubted personal jurisdiction over the defendants based upon "its assessment of the conduct of the relevant party in invoking [the foreign] jurisdiction"; see para 26 of Turner v Grovit (supra). In circumstances such as the present, where, given the size of the cargo claim, the American Club letter was clearly adequate and reasonable security, and where there was, on any basis, uncertainty about the willingness of local banks speedily to provide security that responded to determination of the cargo claim by London arbitration, the defendants' conduct in contending for security provisions that directly or indirectly would bring about a situation where the London arbitration clause was frustrated, amounted not only, in my view, to a breach of implied terms of the arbitration clause, as described in McKay v Dick, but also oppressive conduct. I take on board Mr Happé's criticisms of the implied terms which Mr Layton has put forward. Nonetheless, it seems to me that, subject to being properly pleaded out, they satisfy the standard which I am required to apply at this stage, namely a good arguable case on the particular and very special facts of this case. It follows, that in my judgment, had the court known the full picture as at the date of Cooke J's first order of 16 March 2005, it would indeed have made the order which he did, and, accordingly, I decline to discharge it."

The settlement of insurance claims and the arbitration.

34. CCMN's claims against Axa Senegal under the insurance policy were settled by payment of CFCA 10,210,263 26 May 2005. Somewhat remarkably if the claims against the Owners were thought by Axa Senegal to have any substantial value, no steps have been taken in the arbitration apart from the appointment of an arbitrator. It is moribund.

The claims at trial

35. The Owners contend that in acting as they did and in maintaining the arrest till 24 March 2005, CCMN were in breach of:

(1) the express obligation to submit all disputes to arbitration in London for decision in accordance with English law and/or

(2) an implied term that no party would conduct itself in such a way as would be likely, directly or indirectly, to frustrate the English law and London arbitration clause.

36. They further contend that Axa Senegal, through Mr Dia, caused or procured this conduct and that it wrongfully induced or procured CCMN to breach its contract with the Owners or interfered with the Owner's business relations with CCMN. It is additionally alleged that Axa Senegal conspired with CCMN to do these things. The tort of conspiracy is not alleged against CCMN in these proceedings. As against CCMN the only extant relief sought, the injunction no longer being a live issue, is costs. As against Axa Senegal, the Owners claim damages amounting to US$160,436.65 and €9,574.12. Most of the damages are for loss of hire for 11½ days, whilst the vessel was under arrest after completion of discharge, and for bunkers consumed and port charges incurred during this period.

37. On the first day of the trial, Mr Layton applied for permission to amend the pleadings so that the damages claim was made against CCMN as well. He accepted that, *prima facie*, this claim was within the scope of the arbitration clause, but he contended that, by its defence, CCMN had waived or repudiated the arbitration clause. I refused to allow the amendment on the basis that the defence did not amount to an unequivocal waiver or repudiation of the arbitration clause. So the damages claim is against Axa Senegal only.

The evidence at trial

38. The Owners served witness statements made by Mme Latinier, Ms Smitta Dutta, Captain Eduard Sarr and Mr Parton. The defendants indicated that they did not require Mme Latinier, Ms Dutta and Captain Sarr to be tendered for cross-examination and so their statements were read. Mr Parton was called to give oral evidence and he was cross-examined by Mr Happé.

39. The Defendants initially served witness statements by Mr Dia, Regis Boudin and Terry O'Regan. The statements of M. Broudin and Mr O'Regan were removed from the trial bundles before they reached me. As for Mr Dia, the Owners gave notice that they did wish to cross-examine him and, until shortly before trial, it was understood that he would be attending to give evidence. However, in the week before trial, it was indicated that he would not

now be attending to give evidence. No reason was given for this. No hearsay notice was served. At the close of his factual case Mr Happé applied for permission to admit Mr Dia's written statements. I agreed to admit the statements but made it clear that I thought they bore minimal weight in the circumstances.

40. Both sides called expert evidence on the law and practice of Senegal. The Owners called Maître Geneviève Lenoble, an experienced advocate practising in civil and business law at the Bar in Dakar. The Defendants called Professor Martin Ndende, Professor at the Faculty of Law and Political Science at Nantes Univesity. He has taught law in Senegal – in particular the Masters Degree of Law and Maritime Activities at Cheik Anta Diop University at Dakar. Despite challenges from counsel, I was quite satisfied that both experts were, in their different ways, well qualified to give relevant expert evidence to me and that they showed themselves to be wholly independent and professional. Me Lenoble is better qualified to speak on the actual practice of the Courts of Dakar where she has practised for many years. Professor Ndende is the sounder academic lawyer.

The issues on liability

41. The parties agreed a list of issues for the trial but these were rather overtaken by events. The main live issues were:
    (1) Was an arbitration clause incorporated into the bills of lading, and if so which?
    (2) What, if any, terms are to be implied into arbitration clause in the bills of lading?
    (3) Was the arrest order obtained in Dakar merely security in support of the claim, or was it a substantive claim?
    (4) Was the arrest and the demand for security being used as a means of forcing the Owners to relinquish the London arbitration clause?
    (5) In the light of those findings, was there a breach of the express or implied terms of the arbitration clause?
    (6) What role did Axa Senegal play? Was it merely acting on behalf of CCMN or was it the driving force in its own right?
    (7) What knowledge did Axa Senegal have of the arbitration clause and its incorporation into the bill of lading contracts?
    (8) Did Axa Senegal cause or procure CCMN so to act and was its conduct such as amount to a wrongful inducement or procurement of any breach of the express or implied terms of the arbitration clause?
    (9) Did Axa Senagal unlawfully conspire with CCMN to injure the Owners?
    (10) Damages

Evidence

42. I must now revert to what happened after the arrest of the vessel on 11 March 2005. Mme Latinier made two statements in this case. In a certificate dated 23 May 2005, she stated that she had been in contact with Mr Dia of Axa Senegal by e-mail and telephone on several occasions. She said:

    "During our numerous exchanges, Mr Dia confirmed since arrest of the vessel until release that only a bank guarantee including exclusively Senegalese jurisdiction was acceptable to his company to release the vessel. We proposed [to] him the competent and the English jurisdiction, but he refused each time. We also asked him to confirm all our phone exchanges by e-mails or fax in English but he also refused on the ground that he could not deal with the English language."

    In her witness statement, she said:

    "Mr Dia made it repeatedly clear to me that it was only against a bank guarantee answerable to Senegalese jurisdiction that his company would agree to release the vessel. He refused to agree English jurisdiction".

43. Mme Latinier also stated that on 15 March she tried to get in touch with M. Alioune Diagne, manager of Axa Senegal and Mr Dia's superior. At the time, he was in France at Axa's Paris office. She finally managed to speak to him in on the telephone later that day. She said that:

    "he also refused categorically to take into consideration competent or English jurisdiction's proposal in the guarantee matter. We also proposed to him on behalf of our clients to accept a single letter of undertaking rather than a bank guarantee but one more time faced his refusal." (*sic*)

44. In her witness statement, Mme Latinier painted a picture of intransigence on the part of Axa Senegal. She stated that her clear impression was that Axa Senegal was acting of its own accord and that it was at Axa's instigation that the vessel was arrested and it would only be released on terms dictated alone by Axa. Mr Dia never said that he needed to contact his clients for instructions. Her statement concluded:

    "Not only in the case of Kallang, but in all guarantee matters I have dealt with over the years, Axa Senegal has always acted on its own authority and rarely accepted to negotiate any term of its original demands. Accordingly, my experience is that Axa Senegal's demands in respect of the guarantee wording, including jurisdiction terms, their methods of calculating the anticipated loss and their constant refusal to negotiate were always the same, no matter who the assured was. I truly believe that it is a set internal procedure which they follow rather than any instructions from their assured."

45. Mr Dia disputed this evidence in his statement. He said that although Axa Senegal was corresponding with Mme Latinier, *"we were at all times acting on behalf of and under direct instruction of CCMN"*. Axa Senegal was not involved directly with the application to the Court for the arrest of the vessel. At no stage did Axa Senegal make any suggestion that security would only be accepted if it provided for Senegalese law and jurisdiction.

46. Mr Parton was called to give evidence and he was extensively cross-examined by Mr Happé. He gave evidence of a telephone conversation conducted in French with Mr Dia on 14 March which lasted some 11 minutes. In his

statement, he said that he was told by Mr Dia that a firm decision had been made not to accept an American Club letter of undertaking due to previous difficulties with the Club and that Axa Senegal required a bank guarantee. Mr Parton enquired whether Axa would accept "*competent court or tribunal*" wording. Mr Dia said he would have to speak to his colleagues and he would reply formally in writing.

47. In the course of his oral evidence, Mr Parton was able to produce a two page handwritten note in French of the conversation taken by him at the time. It is very terse. The main part is as follows (in translation):

"There would not even be – the final decision – problems of confidence -we prefer - a bank guarantee – "competent tribunals" - formally in writing - the decision - NP write to us - in writing - his boss - extremely important"

It is not easy to work out from the note who is saying what.

48. In cross-examination, Mr Happé put to Mr Parton that Mr Dia had offered "*tribunaux compétents*" wording on 11 March and it would not have been consistent for Mr Dia then to go back on that. Mr Parton responded that people were not always consistent. Mr Dia was constantly changing the goal posts and that Axa spoke with *"forked tongues"*. The conversation was "all over the shop" and he had the feeling that they were being messed about. The offer of "*tribunaux compétents*" wording offered on 11 March was at odds with what he was being told orally. Mr Dia was being quite opaque and subtle. He was sure that Axa Senegal was trying to achieve Senegalese jurisdiction. There was some discussion in cross-examination about who had said "*competent tribunals"* wording in the conversation. At one stage, Mr Parton thought it impossible to say but he made it clear that Mr Dia had not offered "*competent tribunals"*. In re-examination, he thought that he was noting what he had said to Mr Dia.

49. Mr Dia did not write to Mr Parton as promised and Mr Parton telephoned M. Broudin of Axa Paris on 15 March. Mr Parton telephoned him because they had had previous dealings in relation to the *Cirus* case. Mr Broudin said that "*nous sommes très pragmatiques Mr Parton*" and asked what Mr Parton was proposing. He said a Club letter covering "competent court or tribunal". The conversation became more heated when Mr Parton contended that there was a "*racquette*" going on in Africa whereby shipowners were being blackmailed into paying invented or largely invented cargo claims. The conversation was left on the basis that M. Broudin would get back to Mr Parton. He never did so.

Other arrest cases

50. Mr Parton's evidence also attested to a series of other cases where Axa Senegal had been involved in what he called a scam to force shipowners either to pay up or submit to Senegalese jurisdiction despite the existence of an English law and London arbitration clause. They were relied upon as similar fact evidence. The cases he mentioned were

(1) ***The Pace*** (2003) where Axa Senegal demanded a guarantee answerable to Senegalese law and jurisdiction. It was made absolutely clear that, unless this security was provided, Axa Senegal and Mr Diagne's standard practice would to be proceed to arrest the vessel on the basis that the Judge would insist on Senegalese jurisdiction. In particular in an e-mail dated 12 August, M Diagne stated:

"*En ce qui concerne la letter de guarantie, nous vous précisons que nous n'accepterons pas de compétence de jurisdictions autre que celles Sénégalaises à defaut nous serions constaints de saisier le navire."*

– i.e. with regard to the letter of guarantee we make it clear that we will not accept any jurisdiction other than Senegal, failing which we will have to arrest the vessel."

The owners gave in and provided a Club letter of guarantee answerable to Senegalese jurisdiction. The case has since been settled for less than 10% of the security demanded, but the American Club is still being charged bank fees and charges.

(2) ***The Spring Breeze*** (2003) which did not involve Dakar or Axa Senegal and seems to me to be of little direct relevance.

(3) ***The Cirus*** (February 2005 – very shortly before *Kallang*) involved a cargo of rice discharged at Conakry in Guinea. Axa Senegal was the cargo insurer and it demanded a bank guarantee with a submission to Senegalese jurisdiction. It was indicated that a Club letter of undertaking would be acceptable, but only if French law and arbitration was agreed. The vessel was arrested, but released against an American Club letter of undertaking with Senegalese jurisdiction, to be replaced by a bank guarantee. The Club encountered enormous difficulties in securing a bank guarantee. The Senegalese banks would only issue a guarantee against counter-security from a French bank, but French banks were unwilling to issue a guarantee answerable to the decision of a Senegalese Court. After 4 months of considerable effort by the Club and much bureaucratic obstruction, a guarantee was put up by Credit Lyonnais Senegal, with counter security from Deutsche Bank, but the guarantee was rejected by Axa Senegal, on instructions from head office in France, because Credit Lyonnais Senegal had limited the validity of the guarantee to 1 year, renewable on demand. When threatened with an application for an anti-suit injunction, Me Schmill for Axa Senegal threatened proceedings against the Club in Senegal and refused to accept London arbitration, insisting on Senegal or Guinea, unless French arbitration was agreed. An application was made to the Commercial Court in London for an anti-suit injunction which was granted by Langley J on 3 February. On 4 February, a direction was given by M Broudin of Axa Corporate Solutions in France to Mr Dia (using his first name) and Me Schmill to discontinue immediately any proceedings in Dakar. The claim is now in arbitration.

(4) ***The Argola*** (March 2005, almost immediately after *Kallang*) where security was accepted for "competent court or tribunal". Proceedings were started in Dakar for about 25% of the security that had been demanded and were settled for 10% of the security.

(5) ***The Rizcun Trader*** (May 2005) where Axa Senegal had demanded a guarantee answerable to Senegalese Jurisdiction and then had the vessel arrested. What appears to be a standard form guarantee was produced by Cabinet Pruvot, providing for Senegalese jurisdiction. The case was settled for about a quarter of the security demanded.

(6) ***The Primavera*** (June 2005) which involved a discharge in Tema and again seems to me to be not really to the point.

(7) ***The White Mist*** (July 2005) where Axa Senegal demanded a guarantee answerable to Senegalese jurisdiction. The Club offered security answering to competent jurisdiction. Agreement was reached on the basis of a temporary Club letter of undertaking to be replaced by a bank guarantee. It seems to have been accepted that the guarantee had to be Senegalese. The case was settled before the guarantee was provided.

(8) ***The Pathfinder*** (August 2005) where part of the cargo was insured by Axa Senegal. The vessel was arrested in Rotterdam by receivers insured by other underwriters and released in return for standard Rotterdam security which is neutral on the substantive jurisdiction. This case is of little assistance to me.

(9) ***The Duden*** (December 2005) which is the subject of a separate judgment by me delivered simultaneously with this judgment. I will not repeat my findings of fact here. It is enough to say that the conduct of Axa Senegal in the ***Duden*** case was similar to what is alleged in this case.

(10) ***The Evangelos L*** (January 2006), involving a cargo discharged at Abidjan insured by Axa Senegal, where initially a guarantee was demanded answerable to the Abidjan Court or to the Chambre Arbitrale Maritime de Paris, but, before arrest, a Club letter of undertaking answerable to competent court or jurisdiction was accepted.

(11) ***The Androusa*** (March 2006), involving a cargo discharged at various West African ports including Dakar, where a guarantee for €32,600 answerable to the Dakar Court with Senegalese law or to the *Chambre Arbitrale Maritime de Paris* with French law was demanded. The amount of security required was later increased to €55,000. It is unclear how the demand for security was resolved. The claim was ultimately settled at €6,000.

51. Mr Parton also gave evidence of the great concern that international P&I Clubs, apart from the American Club, had as to what he called the "claims industry" in Senegal being used "to blackmail" owners into giving up London arbitration clauses or simply settling inflated claims to obtain the release of their vessel. I am satisfied that those concerns are genuinely held, although I would not use such inflammatory terms.

52. I have set out this evidence at length. Most of the cases are post-*Kallang*. In my judgment it demonstrates that:

(1) Axa Senegal did not accept, unless forced, that the receivers in West Africa were bound by London arbitration and English law clauses as a result of express incorporation of the charterparty arbitration clause. This conclusion is supported by an undated letter sent by Marine Consultants of France, representing Fortis and Axa Senegal, to Mr Desbrousses of the American Club in late April 2006:

As per Common Law, you consider that from the moment a vessel is chartered the arbitration clause of the C/P is opposable "erga omnes".

We think that because of the principle of autonomy of the contracts, the C/P is "res inter alios acta" as regards the bearers of Bs/L and the subrogated underwriters.

You do not appreciate that proceedings be instituted in Conakry, Bissau, Dakar ... for instance.

The letter proposed that for the future the parties agree that the American Club would issue letter of undertaking accepting arbitration by the *Chambre Arbitrale Maritime de Paris*. The language of the letter is not grammatical but its sense is clear enough. Axa Senegal does not accept that charterparty arbitration clauses can be incorporated in bill of lading contracts, and bind receivers and their cargo underwriters.

(2) It was Axa Senegal's standard practice to try and secure a Senegalese guarantee answerable to Senegalese jurisdiction, whatever the terms of the Bill of Lading as to jurisdiction. This was well understood by the law firms representing owners and their P&I Clubs.

(3) It is, in practice, extremely difficult to procure the issue of Senegalese bank guarantees. It may be practically impossible to do so on terms acceptable to Axa Senegal.

(4) Axa Senegal was acting on its initiative in setting out demands for security. Mr Happé argued that the variety of outcomes suggested that Axa Senegal was acting in accordance with the instructions of the particular receivers. That is not how it appeared to me on the evidence. It is striking that Axa Senegal appeared invariably to be making the decisions without involvement of the receivers.

Expert Evidence

53. Me Lenoble's evidence was that the terms of the arrest order made by President Kandji were normal and complied with the law and judicial practice of Senegal. The arrest was a conservatory arrest based on the Brussels Convention of 1952. In fixing the amount of security required, the Judge is dependent on expert reports provided by the applicant for an arrest. In practice, when claims are tested at a trial, it is apparent that the amount required was "*very excessive*".

54. Me Lenoble was critical of the *Huissier's* demand for payment. He ought not to have made this demand, which was not part of the Court's Order, and had it been complied with, the payment would have been definitive and irrecoverable.

55. Me Lenoble stated that in practice Senegalese Banks will not agree to put in place a guarantee providing for the jurisdiction of a foreign tribunal. They will only guarantee claims in the Senegalese Courts. She strongly doubted

that they would ever agree to put in "competent court". Although she could not say from her experience exactly the time needed, the process of putting up a local guarantee is not straightforward and involved delays, especially if French parent banks have to be involved. Captain Sarr (also not required to attend for cross-examination) stated it would take a lengthy period, which he put at 7-15 days from receipt of instructions from the foreign correspondent bank, to establish a local bank guarantee. If an owner wishes to challenge an arrest, the application is made to the Juge Référré. Theoretically, an application to the lift an arrest takes 48 hours. In practice, it takes a week.

56. So the financial constraints placed on an owner whose vessel is immobilised in Senegal are very considerable, and often out of all proportion to the scale of the cargo claim. Me Lenoble's evidence was that the Juge Référré would never agree to refer a case for decision in a foreign jurisdiction and he would insist on a Senegalese Bank guarantee, unless the parties were agreed otherwise.

57. In cross-examination, she said that, if there was any dispute, the Judge would rule in favour of a Senegalese bank guarantee. Mr Happé referred her to one case, *The Samsun Galaxy*, where in August 2002, Credit Lyonnais Senegal had issued a guarantee of a judgment by "compétents jurisdictions" although it went on to refer to Senegalese Courts. She thought this was an isolated instance but, when pressed, she accepted that if the parties agreed, "anything is possible" and it was possible that, with both parties' agreement, a Senegalese bank would be willing to put up security for a foreign tribunal.

58. Professor Ndende confirmed that the arrest was conservatory. He considered that the *Huissier*'s demand for payment probably derived from provisions of the OHADA Code [1] which required such a demand if the debtor was personally present. The amount of security was usually taken from the claimants' perspective, but he thought Me Lenoble was being a bit excessive in her views.

59. In his view, the Owners could have challenged the arrest by a fast-track procedure. It would have taken 24-48 hours to get a hearing before the Juge Référré and he would make his decision either immediately or within 24-48 hours. Two cases was put to him in cross-examination – one had taken nearly 3 weeks and the other 11 days from arrest to judgment – but he was not able to comment on what he said were unusual delays. I was left with the clear impression that the Professor did not have much practical experience before the Courts of Senegal.

60. He considered that there was no reason why Senegalese banks, which are mainly subsidiaries of the major French banks, would not put up security for foreign judgments. He could not see why a Senegalese Judge would refuse the offer of foreign security, but when pressed to point to a single case where this had happened, he could only say that was common sense. He thought Judges would prefer bank guarantees, but they might accept a letter of undertaking from a large P&I Club.

Conclusions on the evidence

61. Mr Happé argued that I should prefer the documentary evidence and the evidence of Mr Dia to that of Mme Latinier, Captain Sarr and Mr Parton. The normal practice in cases of disputed fact is to pay particular attention to the contemporary documents, following the approach of Robert Goff LJ in ***Armagas Ltd. v. Mundogas S.A. ("The Ocean Frost")*** [1985] 1 Lloyd's Rep 1 at 57, as approved by the Privy Council in ***Grace Shipping v Sharp & Co.*** [1987] 1 Lloyd's Rep 207 at 215:

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

Of course, this is not a fraud case, but Robert Goff LJ's approach is of much wider application.

62. But in this case, the Defendants have not asked to cross-examine Mme Latinier or Captain Sarr. They have offered no witness for cross-examination. All I have are statements from Mr Dia who has not attended for cross-examination for unspecified reasons. I cannot in justice refuse to accept Mme Latinier's and Captain Sarr's evidence when they have been offered for cross-examination and that offer has been declined by the Defendants. If they wished to challenge their evidence they should have asked for them to be called. They should also have called Mr Dia unless there was some compelling reason why that was not possible. No reason has been put forward. His evidence is entitled to minimal weight. No other evidence has been called by Axa Senegal or CCMN, although there were certainly other witnesses who could have been called to give relevant evidence.

CONSIDERATION OF AND CONCLUSIONS ON THE ISSUES

63. I can now turn to consider the main issues in the action.

(1) **Was an arbitration clause incorporated into the bills of lading, and if so which?**

64. The bills of lading expressly provided that all terms and conditions, liberties and exceptions of the Charter Party dated 1 February 2005 "*including the Law and Arbitration Clauses"* were incorporated. On general principle, as a result of the express identification of the arbitration clause, that would be sufficient to incorporate a charterparty arbitration clause, even if it required a degree of manipulation: ***The Rena K*** [1978] 1 Lloyd's Rep 545. The complication is that here there are two charterparties dated 1 February 2005. Each has an English arbitration

[1] The OHADA Code is a procedural code adopted by many Francophone African countries.

clause but in slightly different terms. At first, it was thought by Jackson Parton that the relevant charterparty was the time charter. That was understandable because it is probably quite unusual to have a time charter and a voyage charter concluded on the same date. It soon became apparent that there was also a voyage charter dated 1 February 2005. The bills of lading also provide that freight is payable as per the charterparty. That is naturally a reference to the voyage charter under which freight (as opposed to hire) is payable. Further the terms of the voyage charter are more naturally germane to a bill of lading. In my judgment, it is clear that the intention was to incorporate the terms of the voyage charter, including its arbitration clause, into the bill of lading contracts. Mr Happé did not seriously contend to the contrary.

(2) What, if any, terms are to be implied into arbitration clause in the bills of lading?

65. Mr Layton argued that the Court should imply a term into the arbitration agreement that no party would conduct itself in such a way as would be likely, directly or indirectly, to frustrate the law and arbitration clause incorporated in the bill of lading. In support of this implied term, Mr Layton argued that the Courts will readily imply a term to prevent a contractual party from effectively negating its express bargain. He cited the famous *dictum* of Lord Blackburn in ***Mackay v. Dick*** (1881) 6 App Cas 251, 263:

"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

Lord Blackburn's general rule is put more in terms of construction of the contract than implication of terms.

66. Lord Blackburn's dictum echoed Cockburn CJ's statement in ***Stirling v Maitland*** (1864) 5 B&S 840, 852:

"I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the Company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of the business and dissolution of the Company was certainly the act of the Company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate."

67. The principle stated by Cockburn CJ was accepted as good law by both the majority and by the dissentients in the House of Lords in ***Southern Foundries*** *(1926) Ltd v. Shirlaw* [1940] AC 701. Lord Porter described it (at p. 741) as a "*well known principle*". Lord Atkin said (at p. 717) that Cockburn's CJ's proposition is "*well established law*", adding:

"Personally I should not so much base the law on an implied term but on a positive rule of law of contract that conduct of either promisor or promisee which can be said to amount to himself ***"of his own motion"*** *bringing about the impossibility of performance is itself a breach."*

68. Mr Layton next cited ***Bournemouth and Boscombe AFC v. Manchester United,*** *The Times* 22 May 1980, and in particular the judgment of Donaldson LJ more fully quoted by Hale LJ (who must have had access to a transcript) in ***CEL Group Ltd v. Nedlloyd Lines Ltd*** [2004] 1 Lloyd's Rep 381, 386:

"I have on occasion found it a useful test notionally to write into the contract under consideration a declaratory clause expressing the fact that the parties are not subject to the obligations which would flow from the clause which it is urged should be implied. I think it is useful in this case. We then get a contract reading: ***"It is further agreed that Manchester United Football Club will pay a further sum of £27,770 to Bournemouth & Boscombe Football Club when Edward MacDougall has scored 20 goals in first team competitive football for Manchester United . . . provided always that Manchester United shall be under no obligation to afford MacDougall any reasonable opportunity of scoring 20 goals."*** *It at once becomes clear that the inclusion of the proviso renders this part of the contract 'inefficacious, futile and absurd', to use the words that Lord Salmon used in* ***Liverpool City Council v Irwin*** *[1976] 2 All ER 39 at 50, [1977] AC 239 at 262."*

69. Following Donaldson LJ's lead, Mr Layton devised a rather complex declaration by which to test the proposition that the receivers ought not to be permitted to use an arrest as a means of forcing the Owners to give up the right to have disputes decided by arbitration in London:

"It shall be permissible for a receiver of cargo to obtain, in any country in the world where the Kallang may discharge cargo, an order that the Kallang be arrested to secure that person's cargo claim and be not released from such an arrest unless and until the shipowner provide a bank guarantee under which the bank agrees to make payment to the cargo claimant upon that cargo claimant establishing the liability of the shipowner for such claim before a court or tribunal in that country [or a court or tribunal other then the London arbitration expressly agree by this contract] and not otherwise."

70. The terms that Mr Layton ultimately contended for before Gloster J. were:

(1) to the effect that CCMN would not be permitted to obtain an order for the arrest of the vessel on terms which prevent the release of the vessel from arrest upon the provision of reasonable alternative security;

(2) to the effect that CCMN should not be permitted to procure the arrest of the vessel for any purpose other than to obtain security for its claims.

In her judgment, the Judge was satisfied that that the proposed implied terms satisfied the standard which she was required to apply at that stage, namely a good arguable case on the particular and very special facts of the case. At one stage, Mr Layton argued that the findings of law by Gloster J. were in some way a final decision, binding on the parties. That is not correct. As she made quite clear, the learned Judge was considering the issues on an interlocutory basis pending trial.

71. Mr Happé argued that there was no necessity to imply any term. There is no authority for any such term. It requires considerable elasticity to bring the principle of ***Mackay v. Dick*** into the case. The principle relates, in its natural application, to the case where positive co-operation between the parties is required to bring about a particular end contemplated by the contract. Insofar as this means that the parties have agreed to arbitrate their substantial disputes, it adds nothing to the express words of the arbitration clause and can hardly be used as a basis for implying a term that extends the reach of the arbitration clause. It would be perfectly possible for the parties to agree a more capacious arbitration clause which went as far as catching even security or ancillary proceedings: eg a ***Scott v. Avery*** clause or the GAFTA 119 form quoted in ***Mantovani v. Carapelli*** [1980] 1 Lloyd's Rep 375, 381.

The Brussels Arrest Convention of 1952

72. Before resolving this issue it is necessary to consider the scheme of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships of 1952[2] ("*the Brussels Arrest Convention*") and how applications for security, including arrest, fit into English arbitration law. The scheme of the Convention is as follows:
    - by Article 2, a ship flying the flag of a contracting state can be arrested in the jurisdiction of any contracting state in support of a maritime lien (which includes a cargo claim);
    - By Article 4, the arrest can only be under the authority of a Court (or appropriate judicial authority);
    - By Article 5, the Court within whose jurisdiction the vessel has been arrested must permit the release of the vessel upon sufficient bail or other security being furnished. In default of agreement between the parties as to the sufficiency of the bail or other security, the Court must determine the nature and amount thereof.

73. The Brussels Arrest Convention has not been enacted in English law as such.[3] Instead sections 20-24 of the Supreme Court Act 1981 and CPR Part 61 reflect the scheme of the Brussels Convention as regards ships arrested in England and Wales. By r.61.8(4) the Court has power to order that a vessel be released from arrest. The general principle applied is that the arresting party *"is entitled to sufficient security to cover the amount of the claim with interest and costs on the basis of his reasonably arguable best case"*: ***The Moscanthy*** [1971] 1 Lloyd's Rep 37, 44.

74. Under section 11 of the Arbitration Act 1996, replacing section 26 of the Civil Jurisdiction and Judgments Act 1982 in part, where Admiralty proceedings are stayed for arbitration, the Court:

    "may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—

    (a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or

    (b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award."

75. I was referred to two cases in which the English Courts have had to consider the juxtaposition of a demand for security abroad and an exclusive English jurisdiction or arbitration clause. In ***The Lisboa*** [1980] 2 Lloyd's Rep 546, the bill of lading included an exclusive English jurisdiction clause. Cargo owners had the vessel arrested in Venice in order to obtain security for their claim. The Court of Appeal refused to injunct the cargo owners from proceeding with the arrest of the vessel. Lord Denning MR held that the agreement that *"any and all legal proceedings against the Carrier shall be brought before the competent court at London"* related only to proceedings to establish liability, and not to proceedings to enforce an award or obtain security. In the alternative, he would refuse an injunction as a matter of discretion:

    But when the arrest is made in good faith – for the purpose of obtaining security for a just demand – then I am of opinion that the English Courts should not restrain it by injunction, even though it is said to be in breach of an exclusive jurisdiction clause, see ***Marazura Navegacion S.A. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.,*** [1977] 1 Lloyd's Rep. 281: nor should they award damages for the breach of such a clause. It seems to me that, by the maritime law of the world, the power of arrest should be, and is, available to a creditor -- exercising it in good faith in respect of a maritime claim – wherever the ship is found – even though the merits of the dispute have to be decided by a Court in another country or by an arbitration in another country – and, I would add (contrary to ***The Golden Trader***, [1974] 1 Lloyd's Rep. 378; [1975] Q.B. 348), even though the arbitration is mandatory.

76. The other members of the Court were less emphatic about the first ground and dealt with the case as a matter of discretion. Waller LJ considered that there was a discretion not to grant an injunction, which the Judge had correctly exercised. Dunn LJ said:

    "Although the English Court has jurisdiction to restrain a party to English proceedings from proceeding in a foreign Court, the jurisdiction will be exercised with great caution especially when the defendant to the English proceedings is plaintiff in the foreign proceedings, and the injunction should not normally be granted unless the foreign proceedings

[2] The Convention has been ratified by many countries, including the United Kingdom and Senegal. Its successor signed in 1999 has received little international support.

[3] Nor has the Brussels Collision Convention: see *The Atlantic Star* [1974] AC 464, 455 E-F, 464 A-C, 479A-C.

*are vexatious or oppressive (see **Cohen v. Rothfield**, [1919] 1 K.B. 410 per Lord Justice Scrutton, and **Castanho v. Brown & Root (U.K.) Ltd.**, [1980] 2 Lloyd's Rep. 423; [1980] 1 W.L.R. 833. This is so even if the parties have agreed not to proceed in a foreign Court (**Settlement Corporation v. Hochschild,** [1966] 1 Ch. 10 per Mr. Justice Ungoed-Thomas at pp. 17 and 18) or if they have agreed that all disputes shall be submitted to arbitration in England (**Marazura v. Oceanus,** [1977] 1 Lloyd's Rep. 283). There may however be cases in which the court will exercise the jurisdiction, but as a matter of discretion and not of right (see **Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.,** (1912) 105 L.T. 846; **Ellerman v. Read**, [1928] 2 K.B. 144, and **The Tropaioforos (No. 2),** (1962) 1 Lloyd's Rep. 410). It is always a relevant consideration whether or not the party seeking the injunction will be adequately protected by an award of damages. So far as I am aware there is no case in which an injunction has been granted ordering the release of a ship which has been arrested by a valid order of a foreign Court, but this too in my view is a matter of discretion.*"

The Court of Appeal therefore refused to discharge the injunction.

77. More recently, in ***Petromin SA v. Secnav Marine Limited*** [1995] 1 Lloyd's Rep 603, Colman J had to consider a case where plaintiffs owners were contending that (i) an arbitration should be permanently stayed on the grounds that the defendant charterers had failed to comply with an order for the provision of security for costs and (ii) that the defendants should be injuncted from seeking to arrest the vessel for the purpose of obtaining security for their counterclaim. The Judge refused to stay the arbitration permanently. As to the application for an injunction against arrest, the Judge said as follows (at p.613):

"*It is clear from the decisions of the Court of Appeal in **Continental Bank NA v Aeakos Compania Naviera SA,** [1994] 1 Lloyd's Rep 505; [1994] 1 WLR 588 and **The Angelic Grace**, sup, that the English Courts will in general restrain by injunction foreign proceedings brought in breach of a foreign jurisdiction clause or an arbitration clause. Damages will in general be an inadequate remedy and considerations of comity will not in general inhibit English Courts from restraining continuance of proceedings already commenced overseas. Where, however, the sole purpose of the commencement of the proceedings in a foreign Court is to accomplish the arrest of a vessel in order to provide security in respect of a claim which by reason of an exclusive jurisdiction clause must be brought in a particular Court or by reason of an arbitration clause must be referred to arbitration, it has long been the practice – certainly in the Admiralty Court – for an injunction against the foreign proceedings or a stay of English proceedings only to be granted on terms that alternative security is provided by the party applying for such injunction: see, for example, **The Eleftheria**, [1969] 1 Lloyd's Rep 237 at p 246; [1970] P 94 at p 105, **The Atlantic Star,** [1973] 2 Lloyd's Rep 446; [1974] AC 436 and **The Rena K**, [1978] 1 Lloyd's Rep 545; [1979] 1 QB 377. In the last case Mr Justice Brandon strongly emphasized at p 559, col 1; p 404 the distinction between choice of forum for the purposes of dispute resolution on the one hand and the right to take proceedings **in rem** to obtain security on the other in the following words:*

> *If this distinction between choice of forum on the one hand and right to security on the other is recognized and given effect to in foreign jurisdiction clause cases and vexation cases, I cannot see any good reason why it should not equally be recognized and given effect to in arbitration cases, whether the grant of a stay is discretionary under s 4(1) of the Arbitration Act, 1950, or, as in the present case, mandatory under s 1(1) of the Arbitration Act, 1950.*
>
> *I would like to stress again in this connection also that the distinction in question is clearly recognized and given effect to by the International Convention for the Arrest of Seagoing Ships 1952.*

*This distinction clearly underlies the decision of the Court of Appeal in **The Lisboa**, [1980] 2 Lloyd's Rep 546, a case concerned with an application for a mandatory injunction to restrain an arrest in an overseas jurisdiction in breach of an exclusive jurisdiction clause. In **The Angelic Grace** Lord Justice Leggatt treated that case as representing an exception to the general rule. It is further clear that in the latter case the Court of Appeal was treating the principles applicable to injunctions to enforce arbitration clauses as substantially the same as those applying to exclusive jurisdiction clauses.*

It follows that in the present case, were it not for the fact that the counterclaim has been stayed, attempts by the defendants to arrest the plaintiffs' vessels in foreign jurisdictions solely in order to obtain security for the counterclaim would not generally be restrained by injunction unless the plaintiffs tendered security in lieu of the arrest, but that proceedings in a foreign jurisdiction which were not confined to the obtaining of security and which extended to the determination of issues in the arbitration would normally be restrained."

78. These authorities establish that the English Court will not restrain a party to an English arbitration clause from arresting a vessel in another jurisdiction where the sole purpose of the arrest is to obtain reasonable security for the claim to be arbitrated or litigated in England. Section 11 of the Arbitration Act 1996 also assumes that a Claimant can properly arrest a vessel in order to obtain security for an arbitration claim. The precise basis on which the Court acts – construction of the arbitration clause or discretion – is not authoritatively established but the general approach is clear enough. Where, however, the Claimants' actions go beyond simply seeking reasonable security for the arbitration proceedings, there is a breach of the arbitration clause which the English Court will restrain.

Conclusion on Implied Terms

79. Against this background, I am not persuaded that it is necessary to imply any term of the kind contended for. The bills of lading contain an express agreement, binding on all holders including the receivers, that all disputes are be referred to arbitration in London to be decided in accordance with English law and practice. In my judgment, if one party seeks to use a foreign arrest for ulterior purposes – i.e. beyond obtaining reasonable security for the

arbitration claim – he is in breach of the express agreement whereby he agreed that all disputes would be decided by London arbitration. This is not a case like those in ***Stirling***, ***Mackay*** or ***Bournemouth*** where the parties needed to co-operate to achieve a particular result or to allow one party to perform the bargain. If one party tried to obtain security for proceedings in another jurisdiction or to force the other party to give up his right to arbitrate disputes, that would be a direct and straightforward breach of the arbitration clause.

(3) Was the arrest order obtained in Dakar merely security in support of the claim, or was it a substantive claim?

80. It is clear that the arrest itself was a conservatory arrest for security. The application by Ba & Tandian was for security and payment, but the order obtained was a normal order for security of payment. There was nothing sinister in the terms of application – had there been, this would have been repeated in the draft order prepared for the Court by Ba & Tandian. In my view, the request for security and payment was a word processing error and nothing more.

81. I am equally satisfied, having heard Professor Ndende, that the *Husssier's* demand for payment was intended to reflect the requirements of the OHADA Code. Ba & Tandian, who probably drafted the *Procès-Verbal*, were mistaken in including this sentence because the Owners were not going to be present. I do not think there was any intention to trick the Master. The reality was that it was exceedingly unlikely that he would make payment and, of course, he did not. I rather expect that the *Husssier's* demand for payment completely passed him by.

82. It is easy to understand why, given the terms of the application "*pour avoir sûrété et paiement*" and the terms of the *Huissier*'s demand, it seemed otherwise at the hearing before Cooke J., but the order itself was for security only.

83. Mr Happé submitted that, if I accepted that the arrest was conservatory only, that was the end of the case against CCMN and Axa Senegal. I disagree. The case against Axa Senegal goes much further than just the nature and terms of the arrest itself.

(4) Was the arrest and the demand for security being used as a means of forcing the Owners to relinquish the London arbitration clause?

84. Although Mr Dia indicated in the e-mail sent on 11 March a willingness to accept a bank guarantee answerable to competent tribunals – i.e. neutral as to jurisdiction – this was not Axa Senegal's real or consistent stance. In accordance with his instructions from senior management of Axa Senegal, Mr Dia made clear orally to Mme Latinier it wanted a bank guarantee which was answerable to Senegalese jurisdiction only. He said the same to Mr Parton. Axa Senegal would insist on this before the Dakar Court and it knew that, unless Axa Senegal agreed to accept "*competent tribunal*" wording, the Court would insist on Senegalese bank guarantee answerable to Senegalese jurisdiction. Had it not been for the anti-suit injunction, Axa Senegal would have achieved its end.

85. Until forced by the injunction granted by Cooke J. and the very real threat of sequestration, Axa Senegal was not prepared to accept that CCMN was bound by the arbitration clause and that its cargo claims had to be determined by London arbitration. The arrest order only permitted the release of the vessel on provision of a bank guarantee. In practice, as Axa Senegal intended and the American Club were well aware, unless Axa Senegal was prepared to make it clear that it would accept a first class bank guarantee in support of London arbitration, this would require the production of a Senegal bank guarantee which would answer to a Senegal judgment and which would take some considerable time to obtain. Without agreement, the Court would not accept a foreign bank guarantee. Even if the guarantee was expressed in terms of "competent jurisdiction", the result would be that the Owners were forced to litigate the claim in Senegal. This was not some accidental result. It is clear from what Mr Dia said to Mme Latinier and Axa Senegal's behaviour in other cases that it was Axa Senegal's intention to use the arrest as a means of forcing Senegalese jurisdiction, if at all possible. It was only the intervention of the English Court which prevented this result from being achieved.

(5) In the light of those findings, was there a breach of the express or implied terms of the arbitration clause?

86. The conduct of CCMN through Axa Senegal went well beyond seeking security for its claims in the London arbitration. By seeking to use the arrest as a means of achieving Senegalese jurisdiction, it was in breach of the express terms of the arbitration clause.

(6) **What role did Axa Senegal play? Was it merely acting on behalf of CCMN or was it the driving force in its own right?**

87. I am satisfied on the evidence that Axa Senegal was the driving force in arresting the vessel and using the arrest as a means of forcing Senegalese jurisdiction. It was not taking instructions from CCMN or even consulting with it – nothing has been disclosed by either defendant that any such communication took place. Axa Senegal was exercising its rights under the cargo insurance policy to take control of claims handling even prior to settlement of the insurance claim. Its motives were twofold. First it did not like having cargo claims decided in London arbitration. Second, its chances of effecting a substantial recovery would be much greater if the Hamburg Rules were applied, as they would be by a Dakar Court, rather than the terms of the bills of lading, especially the FIOS clause, and the Hague-Visby Rules which would be applied by London arbitrators applying English law.

88. It was Axa Senegal that finally decided on 23 March that it would have to modify its position. There is no evidence that there was any consultation with the CCMN before the consent order was made. As a result of Axa Senegal's decision, the vessel was released from arrest the next day.

(7) What knowledge did Axa Senegal have of the arbitration clause and its incorporation into the bill of lading contracts?

89. From the outset, Axa Senegal knew that the bills of lading purported to incorporate a charterparty arbitration clause. It was possible, but unlikely, that the charterparty would turn out not to contain an arbitration clause. It was unknown what the terms of the arbitration clause were, especially as to the seat. As Mr Parton fairly observed, however, it was inconceivable that the charterparty would contain a Senegalese arbitration or jurisdiction clause. As from 10 March, it was possible but by no means clear that the London arbitration clause in the time charterparty was incorporated. On the afternoon of 15 March, Axa Senegal (through Me Schmill) was sent a working copy of the voyage charter. Mr Happé argued that Axa Senegal could not know, even then, that there was a London arbitration clause because the charterparty was unsigned. It was not, he submitted, until a signed copy was provided long after the event in June 2006 that Axa Senegal could be said to have known that the voyage charter included an arbitration clause and that this was incorporated into the bill of lading contracts. This submission is unreal. In my judgment, once Axa Senegal had been provided with the working copy of the charterparty, it knew that it was almost certain that there was a binding London arbitration clause. If it was in any serious doubt, it could have checked with Voest-Alpine, the shippers and sellers to CCMN. Mr Dia denies this, but his evidence carries no weight.

(8) **Did Axa Senegal cause or procure CCMN so to act and was its conduct such as amount to a wrongful inducement or procurement of any breach of the express or implied terms of the arbitration clause?**

90. The House of Lords judgment in ***OBG Ltd v. Allan*** [2007] UKHL 21 [2008] 1 AC 1 establishes that, in order for a tortious claim for wrongful inducement or procurement of breach of contract to succeed, it must be established that the defendant:

(1) Knew that he was inducing a breach of contract; and

(2) Intended to do so.

I should stress that both parties agreed that this issue was to be decided in accordance with English law. No case on Senegalese law was pleaded.

91. As to knowledge, Lord Hoffman said this in *OBG*:

> *40 The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In **Emerald Construction Co Ltd v Lowthian** [1966] 1 WLR 691 union officials threatened a building contractor with a strike unless he terminated a subcontract for the supply of labour. The defendants obviously knew that there was a contract—they wanted it terminated—but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said, at pp 700-701:*
>
> *"Even if they did not know the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not."*
>
> *41 This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact: see **Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd** [2003] 1 AC 469. It is not the same as negligence or even gross negligence: in **British Industrial Plastics Ltd v Ferguson** [1940] 1 All ER 479, for example, Mr Ferguson did not deliberately abstain from inquiry into whether disclosure of the secret process would be a breach of contract. He negligently made the wrong inquiry, but that is an altogether different state of mind.*

92. On my findings, Axa Senegal plainly had sufficient knowledge as from the afternoon of 15 March: absolute certainty is not needed for a party to have knowledge. As from 10 March, Axa Senegal knew that it was possible but by no means clear that the London arbitration clause in the time charterparty was incorporated. What is so striking is the complete failure by Axa Senegal to make any of the obvious enquiries that were open to it via CCMN to establish for sure what the position was. An obvious expedient was to enquire of Voest-Alpine what the position was – Voest-Alpine might have refused to do so, even though the confidentiality clause in the charterparty had no application to them as charterers, but that is unlikely. Axa Senegal's attitude seems to have been to wait and see whether the Owners (who were not party to the voyage charterparty) could prove what the position was. In my view, it is a fair inference on the facts and in the absence of any proper evidence from Axa Senegal that it was determined to try and avoid the arbitration clause, whatever it was, and that it made a conscious decision to make no enquiries of its own.

93. As to intention, it is clear that Axa Senegal was determined, if it could, to use the arrest as a means of forcing the Owners to give up the right to have any dispute arbitrated and to accept Senegalese jurisdiction. To use Lord Hoffman's words (at §43), the breach of the London arbitration clause was an end in itself. That counts as an intention to procure a breach of contract.

94. In my judgment, therefore, Axa Senegal's conduct, knowledge and intent was such as to make it liable for the accessory tort of procuring CCMN's breach of the contract to arbitrate all disputes in London. There was an alternative claim for causing loss by unlawful means but Mr Layton recognised that this added nothing and did not pursue it.

(9) **Did Axa Senegal unlawfully conspire with CCMN to injure the Owners?**

95. This claim also really adds nothing to the inducement claim and I will deal with it shortly. Mr Layton contended that he could establish a conspiracy between CCMN and Axa Senegal to injure the Owners – i.e. a conspiracy involving no acts or means which were unlawful – with the object of causing deliberate damage to the Owners without any just cause.

96. I am not satisfied that there was any such conspiracy involving CCMN. The reality is that Axa Senegal simply took over the running of the claim. There is no evidence that it consulted with CCMN. Given the Owners' case about Axa Senegal's conduct, which I have largely accepted, it is somewhat inconsistent to contend that CCMN was party to any conspiracy.

(10) Damages

97. The claim advanced by Owners against Axa Senegal only is as follows:

(1) Loss of hire for 11.4930 days at US$12,000 per day:	$137,916.00	
(2) Additional port charges	$15,859.65	
(3) Cost of 12mt MGO at $515 per mt	$6,180	
(4) Payment to the *Huissier*	$210.00	
(5) Watchmen	$271.00	
(6) 3A correspondent/agent and legal fees		€2,896.15
(7) Survey fees		€1,676.42
(8) Eltvedt O'Sullivan correspondent and legal fees		€5,001.55
Totals:	**$160,436.65**	**€9,574.12**

98. These claims were supported by Ms Dutta, the chartering manger of Trisul, the vessel's managers. Her evidence was that Brobulk were willing to extend the existing fixture for another time charter trip on the same terms including the rate of hire. That potential fixture was lost on 15 March as a result of the vessel's arrest. Trisul then negotiated for a fresh fixture for the carriage of sugar from Brazil to Angola. I am sure that, had the vessel not been arrested, she would have been delivered on arrival in South America into a further fixture with Brobulk at a rate of $12,000 per day. Even after arrest, that fixture remained available till 15 March.

99. However, it by no means automatically follows that the Defendants are liable for damages for the entire period of the arrest. CCMN was entitled to seek security for the claim in London arbitration. What was improper was the attempt to use the arrest as a means of defeating the arbitration clause. I have to ask what the position would have been if Axa on CCMN's behalf had recognised that there was a binding arbitration clause and had acted in good faith in seeking reasonable security for the arbitration, and nothing more. As I see it, it is very likely that the vessel would still have been arrested on 11 March because security would not have been made available by then and she was nearing completion of discharge. However, by the morning of Monday 14 March, had Axa Senegal wanted just to secure the English arbitration claim, it would have taken up Mr Parton's offer of a Club letter of undertaking made on 10 March (and apparently ignored) and a letter of undertaking would have been available. If Axa Senegal had been focussed, as it should have been, on security for a London arbitration, it would not have been demanding a Senegalese bank guarantee which in practice would offer a much lower level of security than an American Club guarantee. The sums involved were modest and an American Club letter of undertaking would have satisfied Axa Senegal, had it been seeking in good faith proper security for the arbitration alone. It is striking that the cargo insurance policy includes the American Club as an acceptable P&I Club. That can only be because its security was regarded as adequate. Even if that is wrong, a London bank guarantee would certainly have been acceptable and that could have been obtained on the morning of 14 March. In my view, on any basis the vessel could and should have been released from arrest by 1530 hours on 14 March with adequate security in place.

100. I would therefore hold that the period during which the Owners lost the use of the vessel, as a result of the breach of contract procured by Axa Senegal, was 10 days. Had the vessel been released on 14 March she would have been delivered 10 days earlier into a fixture with Brobulk. The loss of hire is therefore $120,000. In addition during those 10 days the vessel consumed 10 m.t. of gas oil costing $5,150 and incurred port charges and agency fees. Some of these port charges and agency fees would have been probably incurred anyway – e.g. mooring and unmooring charges and pilotage. I would allow $5,000 for these costs plus $200 for the watchmen. The *Huissier*'s costs would have had to be paid anyway.

101. As to the remainder of the claim I am not satisfied that these costs arise out of CCMN's breach of contract as procured by Axa Senegal. For instance the survey fees would seem to be attributable to the discharge tally and the potential cargo claim. Parts of the expenses may be directly attributable to the breach of contract but I do not have the information available to separate out what is recoverable, and what is not.

Conclusion

102. It follows that I award of damages of US$130,350 to the Owners against Axa Senegal.

Alexander Layton QC (instructed by Jackson Parton) for the Claimant
Dominic Happé (instructed by Marine Law LLP) for the Defendants