JUDGEMENT : Mr Justice Lightman:. Chancery Division. 29th March 2007.

PRELIMINARY

1. In this action the claimant Mr Albon ("Mr Albon") trading as NA Carriage claims relief against the first defendant Naza Motor Trading Sdn Bhd, ("Naza Motors") a company incorporated with limited liability in Malaysia, in respect of a contract between the parties ("the UK Agreement") which (as is common ground) provided for the supply of agency services by Albon in respect of the sale of cars imported into this country by Naza Motors and (according to Mr Albon but disputed by Naza Motors) for the sale and export of cars by Mr Albon from England to Naza Motors in Malaysia.

2. On the 26th August 2005 Mr Albon obtained permission to serve proceedings out of the jurisdiction in Malaysia on Naza Motors and on Tan Sri Dato Nasimuddin Amin ("Mr Nasim"), the controlling director and shareholder of Naza Motors. In those proceedings Mr Albon made two claims against Naza Motors, one in respect of the UK Agreement and one in respect of another agreement, and two claims against Mr Nasim. I shall refer to Naza Motors and Mr Nasim together as "the Defendants".

3. In a judgment given on the 23rd January 2007 I rejected a challenge by Naza Motors to the grant of permission to serve Naza Motors out of the jurisdiction so far as the proceedings related to claims in respect of the UK Agreement but I set aside the grant of permission to serve Naza Motors out of the jurisdiction so far as it related to claims in respect of the other agreement and to serve Mr Nasim in respect of either claim against him. I directed that Mr Nasim should cease to be a party to this action.

4. On the 18th January 2006 Mr Albon obtained an order under CPR Part 6.8 authorising service by a method not authorised by the CPR on Naza Motors and Mr Nasim. In a judgment given on the 9th March 2007 I rejected a challenge by Naza Motors to that order. In view of my previous order that Mr Nasim should no longer be a party, no question arose requiring determination whether the order should have been made in respect of Mr Nasim.

5. Naza Motors contends that on the 29th July 2003 it and Mr Albon in Malaysia entered into a Joint Venture Agreement ("the JVA") which provided for arbitration in Malaysia governed by Malaysian law of all claims between the parties. The terms of the JVA are apt to include the disputes in respect of the UK Agreement the subject of this action and Naza Motors has commenced or purported to commence arbitration proceedings pursuant to the JVA in Malaysia ("the Arbitration Proceedings"). Mr Albon however contends that the JVA is a forgery and on that ground refuses to participate in the Arbitration Proceedings. The issue which I have now to resolve is whether: (1) (as contended by Naza Motors) the genuineness or otherwise of the JVA should be determined by the arbitrators in the Arbitration Proceedings, in which case this action should be stayed pending that determination and the stay should only be removed if the arbitrators decide that the JVA is a forgery; or (2) (as contended by Mr Albon) this court should determine that issue, in which case a stay should only be ordered if the court holds that the JVA is genuine.

RELEVANT CHRONOLOGY

6. The Claim Form in this case was issued on the 10th August 2005. There were two heads of claim against each of Naza Motors and Mr Nasim. On the 26th August 2005 permission was given to serve each of Naza Motors and Mr Nasim out of the jurisdiction. By letter dated the 16th December 2005 Naza Motors and Mr Nasim gave Notice of Dispute-Conciliation under the JVA seeking resolution of the dispute with Mr Albon. By letter dated the 11th January 2006 Mr Albon's solicitors disputed that Mr Albon had signed the JVA. On the 18th January 2006 Mr Albon obtained an order under CPR Part 6.8 authorising service by a method not authorised by the CPR on the Defendants. Pursuant to that order on the 7th February 2006 Mr Albon served the Claim Form on the Defendants. By letter dated the 17th February 2006 Naza Motors and Mr Nasim gave "Notice of Arbitration" under the JVA on Mr Albon. By letter dated the 22nd February 2006 Mr Albon's solicitors again disputed that Mr Albon had signed the JVA. Mr Albon has taken no steps in the Arbitration Proceedings. On the 13th March 2006 Naza Motors and Mr Nasim served an Acknowledgement of Service under CPR Rule 11 for the purpose of challenging jurisdiction accompanied by a Notice of Application to that effect. On the 28th March 2006 Mr Albon applied for inspection of the JVA.

7. On the 22nd May 2006 in response to the notification of intention by Naza Motors to press ahead with the Arbitration Proceedings Mr Albon made a without notice application and was granted by Warren J an interim injunction restraining Naza Motors and Mr Nasim proceeding with the Arbitration Proceedings. By orders dated the 23rd May 2006 (the return date of the application) Warren J directed that the application should be stood over to come on as an application by order and he continued the injunction in the interim. On the 12th September 2006 Briggs J adjourned Mr Albon's application and continued the injunction over the meantime to cover this hearing. Naza Motors has responsibly indicated to the court that it may agree not to take further steps in the Arbitration Proceedings until the court has decided the issue whether the JVA is genuine if the court decides: (1) that it (and not the arbitrators) shall determine the authenticity of the JVA; and (2) that this determination by court is a necessary preliminary to the grant of a stay under Section 9 by reason of the arbitration agreement. Accordingly I do not need in this judgment to determine whether the injunction ought ever to have been granted and whether it ought now to be continued. By reason of the refusal of Mr Albon to participate in the Arbitration Proceedings and the grant of this injunction the Arbitration Proceedings have not proceeded beyond the appointment by Naza Motors of its choice of arbitrator

THE JVA

8. I should at this stage say a word about the issue as to the genuineness or otherwise of the JVA. Mr Nasim and a Mr Naidu (an employee of Naza Motors) have made witness statements to the effect that Mr Albon signed the JVA or acknowledged his signature on the JVA in their presence at the offices of Naza Motors in Kuala Lumpur on the 29th July 2003. Mr Albon has made a witness statement to the effect that he never agreed to or signed the JVA and he suggests that his signature was "lifted" from a document which he signed at about that time at the request of Mr Nasim to be provided to the Malaysian tax authorities. Mr Albon points out a number of features of Naza Motors' case which (he argues) calls into question the evidence of Mr Nasim and Mr Naidu. These include that: (1) the JVA was allegedly made on the 29th July 2003 but according to its terms was deemed to have commenced six years earlier in March 1997. One of Naza Motors' witnesses, Ms Amin in part of her evidence states that the explanation for this given to her by Mr Nasim is that this earlier date was the date when the importation of cars into the UK commenced. Mr Nasim in his later evidence and Mr Albon however agree that trading only started in November 1997; (2) Naza Motors have produced no other document referring to the JVA; (3) Naza Motors first asserted the existence of the JVA in a letter from their solicitors FSI dated the 22nd December 2005; (4) though (according to Naza Motors) the JVA was drafted by Mr Naidu who (according to Mr Nasim) "had many years experience in drafting legal documents on behalf of the Naza group of companies" and though Mr Albon, Naza Motors, Mr Nasim and NA Carriage are named as parties, the document is signed only by Mr Albon and Mr Nasim personally, and there is no reference to Naza Motors at all on the signature page; (5) the layout and print of the last (signature) page is not the same as for previous pages and the last (signature) page is paginated differently; (6) the "draft" which Naza Motors says was produced for discussion prior to finalising the JVA has never been produced; and (7) Naza Motors have refused to permit Mr Albon's expert Mr Brown to take the original JVA away for (non-destructive) testing and to carry out an ESDA test. The features relied on by Mr Albon may be satisfactorily explained at a trial. I cannot resolve the issue of the genuineness of the JVA on the material before me. There must be cross-examination of Mr Albon, Mr Nasim and Mr Naidu and (in all probability) expert evidence. All I can say on the material before me is that the outcome of the trial of the issue is wide open.

STAY

9. The application by Naza Motors for a stay requires close examination of sections 9 ("Section 9") and 30 ("Section 30") of the Arbitration Act 1996 ("the Act") and CPR Rule 62.8(3) ("the Rule"). The two sections of the Act read as follows:

"Stay of legal proceedings

9.(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. …

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. …

"Competence of tribunal to rule on its own jurisdiction

30.(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

The Rule reads as follows:

"Where a question arises as to whether

(a) an arbitration agreement has been concluded; or

(b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement

the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision."

10. The effect of the Act is the subject of a valuable analysis by Toby Landau at pages 117 – 128 of Volume 13 No 4 (1996) of the Journal of International Arbitration. The Act represents a fundamental overhaul of English arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") adopted on the 21st June 1985. Part I of the Act embraces sections 1 to 84 which contains the bulk of the provisions with respect to all aspects of an arbitration pursuant to an arbitration agreement as defined. Part II of the Act contains specific provisions relating to specific arbitrations and most particularly domestic arbitrations.

11. Section 1 of the Act sets out the basic principles ("the Principles") on which Part 1 of the Act is founded and in accordance with which its provisions are to be construed. The first principle is that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary expense or delay. The second

Principle is party autonomy, that is to say that the parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest. An aspect of this principle is the doctrine of "Kompetenz-Kompetenz" namely that the arbitral tribunal may rule as to its own jurisdiction and in particular as to the existence of the arbitration agreement. The doctrine of "Kompetenz-Kompetenz" is given effect in domestic arbitrations by Section 30. The third Principle is that in matters governed by Part I the court shall not intervene except as provided in Part I. The underlying policy in this regard is that the court should only intervene to support rather than displace the arbitral process.

12. Before I examine the provisions of the Act further I should make two preliminary observations. The first is that under section 7 of the Act (unless otherwise agreed) an arbitration agreement forming part of another agreement is not to be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and it shall be treated for that purpose as a separate agreement. The second relates to terminology. A distinction is to be drawn between three terms generally used with reference to arbitration agreements. The first is the term "constituted". An arbitration agreement is constituted when it is brought into existence. The second is "exist" which is an ambiguous term. To say that an arbitration agreement exists may mean that it has been brought into existence and may mean that at any relevant point in time it continues to exist. The third is "validity". An arbitration agreement is valid if in law it is at the relevant point in time legally binding on the parties.

13. The first issue before me is whether on an application for a stay under Section 9(1), if the issue arises whether the arbitration agreement was ever concluded and that issue cannot be resolved on the written evidence before the court, the court can or should give directions for the resolution of that issue by the court or can or should grant the stay so as to enable the issue to be resolved in the arbitration. Mr Waksman counsel for Mr Albon submits that Section 9(1) requires the court itself to resolve that issue. Mr Nathan, counsel for Naza Motors, submits that the issue whether the arbitration agreement was concluded is an issue whether the agreement is null and void within the meaning of Section 9(4) and that both on principle and on authority the issue whether the arbitration agreement was concluded, so long as it is arguable should be referred to the arbitrators and a stay of these proceedings should be granted pending their determination of the issue. The second issue is whether if the court cannot order a stay under Section 9(1) the court can or should grant the stay sought by Naza Motors so as to enable the issue to be resolved in the Arbitration Proceedings in exercise of the court's inherent jurisdiction.

14. I turn now to the first issue. The first question raised is what (if anything) Naza Motors needs to establish as conditions precedent to invoking the jurisdiction conferred by Section 9(1) to grant a stay of court proceedings. In my judgment the language of Section 9(1) plainly establishes two threshold requirements. The first is that there has been concluded an arbitration agreement and the second is that the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration., The first condition is as to the conclusion and the second is as to the scope of the arbitration agreement. Accordingly unless and until the court is satisfied that both these conditions are satisfied the court cannot grant a stay under Section 9.

15. The construction which I have adopted accords with the view expressed obiter in paragraph 36 of its judgment by the Court of Appeal in ***Fiona Trust v. Prialov*** [2007] EWCA 20 that, if the conclusion of an arbitration agreement is in issue, that issue has to be decided under section 9 of the 1996 Act before a stay can be granted under that section. The construction is also in general accord with the thrust of the other authorities cited to me subject only to minor qualifications.

16. Guidelines were laid down by HHJ Humphrey Lloyd QC in ***Birse v. St David*** at first instance (1999) BLR 19 and (though the decision of the judge was reversed) his statement of the guidelines was approved on appeal by the Court of Appeal [2000] 1 Lloyds Rep 57 and again by the Court of Appeal in the later case of ***Al Naimi v. Islamic Press Agency*** [2000] 1 Ll.LR 522 ("***Al Naimi***"). These guidelines are to the effect that on an application for a stay such as the present where the conclusion of the arbitration agreement is in issue, there are four options open to the court: (1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay; (2) to give directions for the trial by the court of the issue; (3) to stay the proceedings on the basis that the arbitrator will decide the issue and (4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay. The Court of Appeal adopted the second of these options. The guidelines and the decision of the Court of Appeal establish that on an application under Section 9(1) of the 1996 Act the court can try and (subject to one qualification) should decide the issue whether the arbitration agreement was concluded. The minor qualification in respect of which the guidelines are not in accord with the construction which I have adopted is in respect of the third of the guidelines. Where there is an issue which the court cannot resolve on the available evidence on the application as to whether the arbitration agreement was concluded, the court indeed can stay the proceedings so that the arbitrators can decide the issue, but only by exercising its inherent jurisdiction and not by exercising any jurisdiction under Section 9. Support for this view may be found in a passage in ***Al Naimi*** at p.528.

17. The construction which I have adopted also accords with the terms of the Rule which provides for the court giving directions for the trial by the court of the issue whether the arbitration agreement was concluded and for the court ordering a stay of proceedings pending the decision at trial.

18. My construction of Section 9(1) is entirely in accord with Section 9(4) and (again subject only to minor qualifications) with the authorities on that section. Section 9(4) assumes that an arbitration agreement has been

concluded and it provides for the situation where issues arise whether that concluded agreement is or may be in law "null and void, inoperative or incapable of being performed". In this context "null and void" means "devoid of legal effect". This is made clear by the decision in 1983 of the US 3rd Circuit Court of Appeals in ***Rhone Mediterranee v Achille Lauro*** 712 F.2d50. The court in that case had to determine the construction of identical wording in Article 11.3 of the 1959 New York Convention. On this issue the court said:

"We conclude that the meaning of Art 11 section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is 'null and void' only (a) where it is subject to an internationally recognised defence such as duress, mistake, fraud or waiver … or (b) when it contravenes fundamental policies of the forum State. The 'null and void' language must be read narrowly for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate." (Pages 3-4).

Likewise in this context for an arbitration agreement to be "inoperative" it must have been concluded but for some legal reason have ceased to have legal effect; e.g. by reason of acceptance of a repudiation as in ***Downing v. Al Tameer Establishment*** [2002] EWCA Civ 721 ***("Downing***") at paragraphs 26-35.

19. I should say a word on the submissions of Mr Nathan, counsel for Naza Motors. He submitted as follows: (1) that the doctrine of "Kompetenz-Kompetenz" precludes the court from intervening with the arbitral process where the arbitral tribunal is seised of the issue of its own jurisdiction and in particular of the issue whether or not an arbitration agreement has been concluded; (2) that in a domestic arbitration under Section 30 of the 1996 Act the arbitral tribunal would have jurisdiction to determine whether the JVA was ever concluded; (3) that on an application for a stay the court is bound by section 9(4) of the 1996 Act to grant a stay of the present proceedings unless satisfied that the JVA is "null and void", a term which embraces the situation where the arbitration agreement was never concluded. He cited in support of this proposition ***Sun Life Assurance v. CX Reinsurance*** [2003] EWCA Civ 283 ("***Sun Life***"); and (4) that if the party seeking a stay can establish an arguable case that the arbitration agreement was concluded, that issue must be determined by the arbitral tribunal. For this proposition he cited ***Downing***.

20. I would answer the first and second submissions as follows. Whilst the doctrine of "Kompetenz-Kompetenz" (which is given effect in a domestic arbitration by Section 30 of the 1996 Act) provides that the arbitral tribunal shall have jurisdiction to determine whether the arbitration agreement was ever concluded, it does not preclude the court itself from determining that question. There are two reasons why the court must have jurisdiction to rule on whether the arbitration agreement was concluded. The first is that the Rule of Law in general and subject only to limited exceptions requires that a party should not be barred from access to the court for the resolution of disputes unless the grounds for such bar are established. A bar on the ground of the alleged conclusion of an arbitration agreement (in general and subject only to limited exceptions) is not established unless and until the court has ruled on the issue whether it has been concluded. The second is that, unless and until it is held that the arbitration agreement has been concluded, the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play or at any rate do not come into play with their full force and effect.

21. As regards the third submission, I have already given my reasons for holding that an arbitration agreement must have been "*concluded*" before it can be held to be "*null and void*". It is true that in the second sentence of his judgment in ***Sun Life Assurance*** Potter LJ did indeed say: *"The judge [below] dismissed the application, holding that no arbitration agreement had been concluded between the parties and that the agreement relied on by CNA was thus 'null and void' within the meaning, and for the purposes, of s.9(4) of the 1996 Act."*

The judgment of the first instance judge is not available. But it is clear that there was no issue and no argument in ***Sun Life*** whether, in a case where no arbitration had been concluded, the situation was outside Section 9(1) or *"null and void"* within Section 9(4). The dictum can carry no weight and certainly no sufficient weight to undermine the conclusion which I have reached.

22. As regards the fourth submission Mr Nathan relies on another dictum of Potter LJ in ***Downing*** where he said: *"The burden of proving that any of the grounds in s.9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted:* ***Hume v AA Mutual International Insurance Co Ltd*** *[1996] LRLR 19."*

The fact that under Section 9(4) a party invoking an arbitration clause may need only to raise an arguable case of the validity of an arbitration agreement to entitle himself to a stay in no way militates against the existence of the requirement under Section 9(1) of establishing the conclusion (and not merely the arguable conclusion) of an arbitration agreement. It is unnecessary to examine the question raised by Mr Waksman whether the statement of law by Potter LJ is established by the authority which he cited.

23. I accordingly hold that, in view of the present unresolved issue of fact as to whether the arbitration agreement was concluded, there is as yet no jurisdiction under Section 9 to grant a stay. Jurisdiction under Section 9 to do so will only arise if and when the issue is resolved in favour of its conclusion.

24. I must accordingly turn to the second issue whether it would be right in the present circumstances to exercise the inherent jurisdiction to grant a stay and (in effect) remit the issue whether the JVA was concluded to be decided in the Arbitration Proceedings. The absence of jurisdiction under Section 9(1) to order a stay for this purpose does not preclude the existence and exercise by the court of its inherent jurisdiction to order a stay for this purpose. The court may in exercise of its inherent jurisdiction in its discretion order such a stay both where the issue is as to the conclusion or as to the scope of the arbitration agreement. But the court should only exercise its inherent

jurisdiction to order such a stay and decline to decide the issue of the conclusion of the arbitration agreement or of the scope of the arbitration agreement in an exceptional case. The inherent jurisdiction should be exercised with particular caution where the issue is as to the conclusion of the arbitration agreement. The court may very exceptionally order such a stay e.g. if virtually certain that the arbitration agreement was concluded. Exceptional but less compelling circumstances (e.g. overwhelming considerations of convenience and cost) may justify such a stay where the issue of the scope of the arbitration agreement is in issue e.g. when the issue is closely bound up with the issues in the arbitration: see ***Al Naimi*** at 525 and ***El Nasharty v. J Sainsbury*** [2004] 1 Ll Rep 309 at paragraphs 28-9.

25. In making its decision whether to exercise its inherent jurisdiction the court is in my judgment entitled to take into account whether the commencement of the court proceedings preceded the commencement of the Arbitration Proceedings and whether the decision of the arbitrators on this issue is subject to review by a court: as to the latter, consider paragraph 138 of the 1996 Report by the Departmental Advisory Committee on Arbitration Law on the (then) Arbitration Bill. The commencement of these proceedings preceded the commencement of the Arbitration Proceedings in Malaysia and (according to the Brief Agreed Summary of the expert evidence) the courts in Malaysia have no statutory jurisdiction equivalent to that afforded in domestic arbitrations by Sections 30(2), 67 and 72 of the Act to review or interfere with any decision by arbitrators in Malaysia as to the conclusion of the arbitration agreement and probably have no inherent jurisdiction to do so: at best any inherent jurisdiction is in doubt. I take these considerations into account.

26. In my judgment this is not one of those exceptional cases where exercise of the inherent jurisdiction is called for. There are no sufficient exceptional circumstances. In the circumstances of this case I think that I should give directions for the expedited trial by the court of the issue as to the genuineness of the JVA. I fully recognise that this may require Mr Nasim and Mr Naidu and possibly other witnesses from Malaysia to give evidence in London. I have already held that English law is the proper law of the UK Agreement and that England is the proper forum for the trial of Mr Albon's claim in respect of the UK Agreement against Naza Motors. Mr Nasim has longstanding links with this country. Requiring the trial to take place here will occasion no injustice to Naza Motors. It may be possible for some (if not all) of the evidence of witnesses in Malaysia to be given by video link (assuming that video link is available in Malaysia) although I appreciate that in view of the seriousness of the issues Mr Nasim and Mr Naidu may well wish to attend the trial. The reports of the parties' experts after the proper testing of the JVA may well prove of paramount importance, if not conclusive. I do not think that it would be just in all the circumstances of this case to require Mr Albon to submit himself to the Arbitration Proceedings in Malaysia unless and until the validity of the JVA has been decided against him here.

CONCLUSION

27. In these circumstances pursuant to the Rule: (1) I order that the issue whether the JVA is authentic shall be decided by this court; (2) I invite the parties to propose and (if possible) agree directions in respect of such trial; and (3) I order that pending the decision at such trial these proceedings shall be stayed.

28. I gratefully acknowledge the contribution of counsel to this judgment.

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