IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE COLMAN

QBCMF 97/0178/B

Royal Courts of Justice
The Strand
London WC2

Tuesday 25th November, 1997

B e f o r e:

LORD JUSTICE STAUGHTON
LORD JUSTICE PHILLIPS
LORD JUSTICE ROBERT WALKER

- - - - - -

ALFRED C. TOEPFER INTERNATIONAL GMBH

Respondent

- v -

SOCIETE CARGILL FRANCE

Appellant

- - - - - -

(Handed down Transcript of Smith Bernal Reporting Limited
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MR S MORRIS (Instructed by Messrs Middleton Potts, London EC1A 7LD) appeared on behalf of the Respondent

MR S PHILLIPS (Instructed by Brian Perrott Esq. Cargill PLC, Surrey KT11 2PD) appeared on behalf of the Appellant

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J U D G M E N T
(As approved by the Court)

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Tuesday 25th November, 1997

JUDGMENT

LORD JUSTICE STAUGHTON: For the reasons that have been handed down this appeal will be referred to the European Court.

LORD JUSTICE PHILLIPS: This is the Judgment of the Court.

In January 1994 Cargill entered into three contracts for the purchase from Toepfer of a total of 9500 tonnes of soybean meal pellets, CIF Montoir, in France. Pursuant to these contracts pellets were carried to Montoir aboard the GULF WAVE, which arrived at Montoir on the 7th February. A dispute then arose between Cargill and Toepfer as to whether the pellets complied with the contract. It is common ground that each contract included a clause that required the dispute to be resolved by a GAFTA arbitration, to the exclusion of any other tribunal. This clause should have ensured that the dispute was resolved cheaply and expeditiously by an expert tribunal. The parties have, however, become embroiled in a procedural dispute which raises complex issues as to the interpretation of the Brussels Convention 1968 and which must already have involved legal costs far in excess of the amount at stake in the substantive dispute. Nor will this appeal resolve these issues. They are of general importance and the solution to them is far from clear. Accordingly we have resolved that it is appropriate to refer them for the ruling of the European Court of Justice, pursuant to Schedule 2 to the Civil Jurisdiction and Judgments Act 1982. The object of this judgment is to put in context the questions referred.

History of the proceedings

On the 8th February, Cargill became concerned about the condition of the cargo and gave notice of those concerns to Toepfer. Toepfer responded the following day, contending that the contracts, which were on the terms of GAFTA Form 100 and contained the so-called "standing in" clause, provided for the sampling and analysis procedure, which should be followed. Instead of following this procedure, Cargill made an application to the Tribunal de Commerce de St. Nazaire ("the French Court") under an urgent interlocutory procedure known as "en referé" for the appointment of a court expert to ascertain the

relevant facts. The French Court made the order sought the following day. Mr Harang, the appointed expert asked Toepfer to produce certificates of analysis at the loadport. Toepfer declined to do so on the ground that under the contractual provisions these were irrelevant. Cargill's response, on the 11th February, was to make a further application "en referé" for the production of these certificates. On this day discharge was completed. Cargill rejected the major part of the cargo and called for arbitration, stating that the appointment of their arbitrator would follow.

On the 17th February Cargill nominated Mr Scott as their Arbitrator.

On the 22nd February the French Court heard and dismissed objections made by Toepfer to the two orders made "en referé". At this stage Cargill had given no indication that they did not intend that the substantive dispute should be resolved by arbitration. Their case was that the "en referé" orders were justified in order to obtain evidence for the purpose of the arbitration.

On the 1st March Toepfer appointed Mr Sears as their arbitrator in the arbitration.

On the 14th September Toepfer appealed to the Cour d'Appel de Rennes against the two orders made "en referé". Their appeal was dismissed on the 19th October.

On the 7th February 1995 Cargill issued proceedings in the French Court making a substantive claim for damages against Toepfer. At the same time, however, they gave notice renewing the arbitration - under the GAFTA rules this has to be done every 12 months, failing which the arbitration lapses unless the arbitrators, in their discretion, otherwise order.

On the 20th February Toepfer referred to GAFTA arbitration a claim for damages on the ground that Cargill had acted in breach of contract in commencing court proceedings in disregard of the arbitration

clause. They nominated Mr Scott as their arbitrator. On the 11th April Cargill nominated Mr Sears as their arbitrator in respect of this claim.

On the 5th April 1996 Cargill purported to renew the arbitration once again. Toepfer took the point that they were out of time and contended that their claim for arbitration was deemed withdrawn.

On the 17th June 1996 the expert appointed by the French court delivered his report to the Court.

On the 19th June Toepfer submitted, pursuant to Section 1458 of the New Code of Civil Procedure, an objection to the jurisdiction of the French Court in respect of the substantive proceedings, invoking the exclusive GAFTA jurisdiction clause and seeking an order that the French Court declare itself incompetent and refer the proceedings to arbitration. At the same time Toepfer gave Cargill notice that if they did not desist from the French proceedings, Toepfer would apply to the High Court in London for an injunction restraining the French proceedings.

In the absence of response from Cargill, Toepfer initiated the present proceedings by originating summons on the 16th September 1996. On the 16th October the French Court ordered that Toepfer's objection to the jurisdiction of the French Court should be heard on the 11th December, but that hearing was subsequently adjourned, pending the result of these proceedings.

The Relief Sought

The relief sought in the present proceedings was as follows:

1. A declaration that the claims made by the Defendant against the Plaintiff in proceedings commenced by writ dated 7th February 1995 in the Tribunal de Commerce de Saint-Nazaire in France (The French Proceedings") are disputes within the scope of disputes agreed by the Plaintiff and the Defendant to be referred to arbitration, in accordance with Arbitration Rules No.125 of the Grain and Feed Trade Association ("GAFTA 125") under clause 32(a) of Form 100 of GAFTA ("GAFTA 100")

incorporated into and forming part of three contracts each made between the plaintiff as seller and the defendant as buyer and dated 17th, 18th and 20th January 1994 for the sale of 7,000, 1,000 and 1,500 metric tonnes respectively of soyabean meal pellets.

2. A declaration that the Defendant is entitled and obliged to refer the disputes referred to in 1. above to arbitration under the rules of GAFTA 125 in accordance with clause 32(a) of GAFTA 100.

3. A declaration that the commencement by the defendant on or around 7th February 1995 of the French Proceedings constituted, and the continuation of the said proceedings by the First Defendant will constitute:

   (a) a breach of the agreements made between the plaintiff and the defendant under clause 32(a) of GAFTA 100 as incorporated into the Contracts, to refer to arbitration all disputes arising out of or under the Contracts.

   (b) a breach of the agreements made between the plaintiff and the defendants under clause 32 of GAFTA 100 as incorporated into the Contracts, providing for exclusive jurisdiction of the Courts of England or arbitrators in England over all disputes arising under the Contracts.

4. An injunction restraining the Defendant whether by itself its servants or agents or howsoever otherwise from:

   (a) continuing or prosecuting or taking any further steps in or assisting in the continuation, prosecution or taking of further steps in or otherwise further participating in the French Proceedings;

   (b) commencing any further or other proceedings in any court wheresoever situated, otherwise than by arbitration in London under GAFTA 125, against the plaintiff in respect of all or any claims made in the French Proceedings and any other dispute arising out of or under the Contracts.

5. An injunction requiring the defendants by itself its servants or agents or howsoever otherwise to discontinue, or take all steps necessary to effect a discontinuation of the French Proceedings.

On the 20th December 1996 Colman J. granted the relief sought. Cargill then appealed to this court against his order.

The jurisdiction provisions in the contracts

The contracts were subject to the following provisions of GAFTA Form 100:

31. DOMICILE - Buyers and Sellers agree that for the purpose of proceedings either legal or by arbitration this contract shall be deemed to have been made in England and to be performed there any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding and the Court of England or arbitrators

appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile, residence or place of business of the parties to this contract may be or become.

32 Arbitration -

(a) Any dispute arising out of or under the contract shall be settled by arbitration in accordance with the Arbitration Rules No. 125 of The Grain and Feed Trade Association in the edition current at the date of this contract, such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.

(b) Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrator(s) or a Board of Appeal as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrator(s) or a Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any persons claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.

The issues raised

By no means all the issues raised in these proceedings involve the interpretation of the Brussels Convention. We think that it will be helpful, however, if we identify all the issues and resolve those which do not turn on the interpretation of the Convention, albeit that on one view of the Convention the English Court should not even embark on considering some of the issues raised.

One issue we feel we should address at the outset. This is the basis upon which Colman J's order was made. There are two possibilities:

(1) The English court has a discretionary power to restrain by injunction a breach of contract.

(2) The English court has recently asserted, in relation to those subject to English jurisdiction, the power to restrain by injunction the pursuit of proceedings in a foreign jurisdiction where such conduct is unconscionable - see British Airways Board v. Laker Airways Limited [1985] AC 58; Midland Bank PLC v. Laker Airways Limited [1986] QB 689; Airbus Industrie GIE v. Patel [1997] 2 Lloyds Rep. 8.

We are in no doubt that the power which Colman J. purported to exercise was the former. Cargill has done nothing intrinsically unconscionable in commencing proceedings in France. The only ground on which objection can be taken to such conduct is that it is in conflict with Cargill's contractual agreement to arbitrate - see Schiffahrtsgesellschaft Detlief von Appen Gmbh v. Wiener Allianz Versicherungs AG [1997] CCL 993 at 1009. Furthermore, the claims for declarations make it plain that Toepfer's application to the English court was founded on their contractual rights.

Cargill's Case

Cargill's submissions can be summarised as follows:

1. Before the English proceedings were commenced, French proceedings had been commenced to which the Convention applied.

2. The Convention applies to the English proceedings.

3. The French proceedings and the English proceedings involve the same cause of action, within the meaning of that phrase in Article 21 of the Convention. Accordingly, the English court is bound to stay the English proceedings until the issue raised as to the jurisdiction of the French court has been resolved by the French court.

4. Clause 31 of the contracts does not apply to the English proceedings; its effect in this case is only to give exclusive jurisdiction over substantive disputes to GAFTA arbitrators.

5. In any event, the English court is not competent to entertain the claim for relief brought by Toepfer in the absence of a prior arbitration award determining that Cargill's conduct in pursuing the French proceedings constitutes a breach of contract - see the so-called Scott v. Avery clause

in clause 32 of the contracts.

6. If, contrary to the above submissions, Colman J. had a discretion to grant the relief sought, he erred in principle in the exercise of that discretion.

Toepfer's Case

Toepfer's case is as follows:

1. The French proceedings are subject to the Convention, although the determination of the jurisdiction objection to those proceedings is not governed by the Convention, but rather by French domestic law.

2. The English proceedings are not subject to the Convention owing to the exception of arbitration in Article 1(4).

3. If the Convention applies to the English proceedings, the French proceedings and the English proceedings do not involve the same cause of action, so that Article 21 does not apply.

4. Article 21 has no application because the contracts are subject to exclusive English jurisdiction clauses and Article 17 has paramount effect.

5. The Scott v. Avery clause does not apply to the English proceedings.

6. The manner in which Colman J. exercised his discretion cannot be attacked.

In each case issues 1 to 3 and part of issue 4 depend on the interpretation of the Convention; the remainder of issue 4 and issues 5 and 6 depend upon English law and procedure. We propose to address

these issues first in order to identify the significance of the questions raised in relation to the Convention.

The Scott v. Avery Clause

Before Colman J. Cargill argued that Clause 32(b) precluded Toepfer from bringing the present proceedings without first obtaining an arbitration award. This was a submission not lacking in effrontery, having regard to their own conduct in bringing proceedings in France. Colman J. gave it short shrift. He held at p.19:

> "This submission is, in my view, quite unsustainable. The disputes to which clause 32 applies are, on the proper construction of that clause, clearly substantive disputes and not disputes as to compliance with the very clause itself. The obvious purpose and meaning of the clause is that neither party can have resort to any action or legal proceedings in respect of substantive disputes unless and until the disputes have been referred to arbitration and an award obtained. A dispute as to whether an anti-suit injunction should be granted in order to cause one party to comply with the clause cannot have been intended by the parties to have been covered by the words "any dispute arising out of or under this contract". The arbitrators could not grant such an injunction.
>
> An award is therefore not a condition precedent to the claim for an injunction not for the claim for declarations. Those declarations sought merely express the factual bases which must be established in order to obtain the injunctions. The determination of the existence of those facts for the purpose of obtaining the injunctions would not, if in issue, fall within clause 32. The fact that the plaintiffs claim declarations as relief ancillary to the injunctions does not take (sic) issues as to those facts within clause 32."

By "take" the Judge may have meant "make".

Mr Tselentis, for Cargill, challenged Colman J.'s finding on this point. He pointed out that Toepfer had already commenced an arbitration claiming damages for Cargill's alleged breach of the arbitration agreement in starting proceedings in France. Cargill had not admitted the alleged breach. There was thus before the arbitrators a dispute as to whether there had been a breach of the arbitration clause. Toepfer's application for an injunction raised precisely the same issue and an identical dispute. That dispute had to be referred to arbitration. Mr. Tselentis referred us to the decision of Clarke J. in Halki Shipping v. Sopex Oils [1997] 1 WLR 1268 in support of the proposition that failure by Cargill to admit a claim, even where there were no apparent grounds upon which they could challenge it, raised a dispute which had to be referred to Arbitration. He also relied upon the decision of this Court in Mantovani v. Carapelli [1980] 1 Lloyds Rep. 375 as demonstrating that Colman J. was in error in confining the

application of Clause 32 to substantive disputes.

The latter case also concerned a GAFTA Scott v. Avery clause, which was in essentially identical terms to that with which we are concerned. The sellers had commenced an arbitration against the buyers but, before obtaining an award, had brought proceedings in Italy to obtain security for the claim advanced in the arbitration. The Court of Appeal held that this conduct constituted a breach of the Scott v. Avery clause. In the course of the leading judgment Lawton L.J. said of the clause, at p.381:

> "For my part, I would construe the words as meaning that any form of application for ancillary relief, and in particular that sought in Italy, was within the arbitration clause"

He went on to observe, however:

> "In the ordinary way, those who try to obtain ancillary relief through the Courts will do so in England, and if they do so in England then no question of damage can arise because under the terms of most arbitration clauses, and certainly under the terms of clauses providing for arbitration within the jurisdiction of the Supreme Court of Judicature, the Arbitration Act, 1950, applies. In those circumstances, what the parties do if they seek ancillary relief within the jurisdiction of this Court is something which the arbitration clause and the Arbitration Act permits. In other cases it may be convenient for the parties, and probably would be, to restrain what was being done in foreign Courts by means of an injunction."

Megaw L.J. agreed. He was however prepared to contemplate the possibility that an injunction could have been sought by the buyers in England to restrain the Italian proceedings - see p.384.

We have not found very satisfactory an approach which, as a matter of implication, applies a Scott v. Avery clause to ancillary proceedings outside England but not to ancillary proceedings within the English court. Be that as it may, we are satisfied that, as a matter of construction, a Scott v. Avery clause cannot apply to injunctive proceedings brought for the purpose of enforcing the clause itself. Insofar as an issue arises, it is likely to be as to whether or not the substantive dispute falls within the jurisdiction of the arbitrators, which is not a suitable issue for determination by the arbitrators themselves. More significantly, an injunction does not fall within the relief that arbitrators are in a position to provide. For

these reasons, which are narrower than those of the Judge, we hold that the Scott v. Avery clause in Clause 32 did not preclude Colman J. from entertaining the claim for relief that was before him.

The exclusive jurisdiction clause

Colman J.'s finding in relation to the application of Clause 31 dovetailed neatly with his view of the effect of the Scott v. Avery provision in Clause 32. The vital words of Clause 31 are:

> "the Court of England or arbitrators appointed in England, as the case may be, shall.... have exclusive jurisdiction over all disputes which may arise under this contract."

Colman J. held that the effect of these provisions was to share between the English Court and the arbitrators exclusive jurisdiction over all disputes. Those disputes which went to substance fell within the exclusive jurisdiction of the GAFTA arbitrators whereas disputes in relation to ancillary matters fell within the exclusive jurisdiction of the English Court. Thus, in relation to Clause 31, he held at p.15:

> "The effect of that clause, read together with clause 32, is that the English courts are to have exclusive jurisdiction in all matters except those falling within the ambit of the arbitration agreement and relating to enforcement of awards. That would include applications for injunctive relief to enforce the arbitration agreement."

Mr. Tselentis challenged this conclusion. He submitted that Clause 31 provided alternative jurisdictional regimes, applicable to all disputes covered by that clause. We agree. Just as we would, if permitted, construe Clause 32 as relating to disputes of substance, rather than in relation to ancillary relief, so also we are of the view that Clause 31 applies to disputes of substance. We do not consider that Clause 31 must be construed as tailored to fit with Clause 32. If the draftsman had wished to apportion jurisdiction between the Court and arbitrators we do not believe that he would have done so in this way. We consider that Clause 31 is designed to apply where the contract provides for arbitration and also where it does not. Where, as here, the Contract includes Clause 32, the alternative provision in Clause 31 for exclusive jurisdiction of the English Court does not take effect. Thus we differ from the

conclusion of Colman J. that proceedings to enforce the Arbitration clause were, by Clause 31, agreed to be subject to the exclusive jurisdiction of the English Court. The present proceedings are not subject to an agreed exclusive English jurisdiction.

Discretion

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article II.3 requires the Court of a contracting State to refer the parties to arbitration when an action is commenced in disregard of a binding arbitration clause. It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a Defendant who was improperly sued in disregard of an arbitration agreement in the Court of a country subject to the New York Convention were left to seek a stay of the proceedings in the Court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign Courts to stay proceedings in accordance with the New York Convention, for it has become the habit to seek anti-suit injunctions such as that sought in the present case. In the Angelic Grace [1995] 1 Lloyds Rep. 87 the Court of Appeal gave its approval to this practice. In the course of his judgment, Millett L.J. said at p. 96:

> "In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There had been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

While we would not wish it to be thought that we have independently endorsed these sentiments, in view of this decision we feel obliged to hold that Colman J. did not err in principle in the exercise of his

discretion when granting an injunction in this case. The point will be open to argument in a higher tribunal.

The Consequence of our findings

Our finding in relation to the Scott v. Avery clause rejects the argument that the English Court is precluded, by the terms of the contracts, from entertaining the present proceedings. Our interpretation of Clause 31 (the exclusive jurisdiction clause) has the result that Article 17 is of no benefit to Toepfer. If the point had arisen, we would have been bound to hold that Article 17 overrides Articles 21 and 22 of the Convention. This is because it has been so held by this Court in Continental Bank v. Aeakos [1994] 1 WLR 588. That decision has provoked widespread controversy and it is, perhaps, a pity that these proceedings are unlikely to provide an occasion for its review.

We now turn to outline the issues which arise in relation to the Convention.

The Convention issues

The foundation of the challenge to the jurisdiction of the French Court that Toepfer has made pursuant to Section 1458 of the civil code in the French proceedings is founded on the allegation that the substantive dispute is subject to an exclusive English jurisdiction agreement. The object of that challenge is to prevent the French Court from exercising jurisdiction. The basis of the application for relief in the English proceedings is the same, as is, broadly speaking, its object. Cargill allege that both the French and the English proceedings raise the same cause of action and that, as the French Court was seized first, Article 21 of the Convention requires the English Court to stay the English proceedings until the issue of the jurisdiction of the French Court has been resolved in the French proceedings. Toepfer contend that Cargill's case is unsound for two reasons:

(i) Proceedings to determine the validity of an arbitration clause fall within the Article 1(4)

exception, so that the Convention does not apply.

(ii) the cause of action in the French proceedings is not the same as the cause of action in the English proceedings.

Both these contentions raise difficult questions of interpretation of the Convention and the former, in particular, has given rise to a conflict of academic views and legal decisions. It may be helpful if we briefly identify some of these.

Proceedings to determine the validity of an arbitration clause

The Jenard Report (OJ C59 5.3.79 p.13) states in relation to Article 1(4):

> "The Brussels Convention does not apply to the recognition and enforcement of arbitral awards (see the definition in Article 25); it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration - for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings."

Similarly the Schlosser Report (OJ C59 5.3.79 p.93) states:

> "In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention."

The Evrigemis and Kerameus Report (OJ C 298 24.11.86 p.10) states, however:

> "...the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope."

In The Atlantic Emperor (No 1) [1991] ECR 1-3855 Advocate General Darmon expressed the following opinion at p.3886:

> "Judgments given in response to an objection of lack of jurisdiction raised in order to resist a substantive claim likewise hardly qualify for international recognition, since their direct purpose is to give a decision as to the jurisdiction of the national court which delivers them. By contrast, it seems legitimate for a judgment which is given at the place where the arbitral tribunal is sitting and which gives a decision, as a main issue, on the arbitrator's jurisdiction (either as a declaratory judgment or in the context of an action for annulment) to be recognised, on certain conditions, in other countries. Admittedly, the place of arbitration is often accidental and unrelated to the substance of the dispute. But that in itself ensures the all-important neutrality. In any event there is no alternative if the aim is to endeavour to centralize control in order to harmonize decisions at international level."

The European Court left undecided, however, whether a free-standing dispute as to the existence or validity of an arbitration clause falls within the Article 1(4) exclusion.

Since then there has been discussion and disagreement as to the ambit of the Article 1(4) evidenced by the following cases:

The Heidberg [[1994] 2 Lloyds Rep. 287; The Angelic Grace [1994] 1 Lloyds Rep. 168; The Xing Su Hai [1995] 2 Lloyds Rep. 15; Toepfer v. Molino Boschi [1996] 1 Lloyds Rep. 510 and Lexmar v. Nordisk [1997] 1 Lloyds Rep. 289.

The cause of action in Article 21

On Cargill's argument, the French proceedings involve two "causes of action" within the meaning of that phrase in the English version of Article 21 - the substantive claim for damages and the procedural dispute in relation to the arbitration clause. Cargill contend that the English proceedings involve the second cause of action and that Article 21 applies accordingly. It seems to us that a question arises as to whether a dispute as to jurisdiction can properly be categorised as a "cause of action" at all. The scheme of the Convention appears to anticipate that a dispute as to the jurisdiction of a court to entertain a substantive dispute will arise either by way of a challenge to jurisdiction in the court first seized or by reason of the commencement of proceedings involving the same substantive dispute before a second court. Mr Tselentis conceded in argument that, had Toepfer not challenged the jurisdiction of the French Court, he would have had no case to advance under Article 21. It seems to us, however, in fundamental

conflict with the scheme of the Convention that a Defendant before the Court first seized should, without entering a challenge to jurisdiction in that Court, be able to commence proceedings in a second Court in order to challenge the jurisdiction of the Court first seized.

These questions apart, it seems to us that a nice question arises as to whether one can equate, as a cause of action under Article 21, a procedural objection under the domestic civil code in the French Court with a claim for relief based on an allegation of breach of contract in the English Court. While the form is totally different, the principal issue - the existence of a binding arbitration agreement - is the same. So is the object of each proceeding - the restraint of the substantive hearing before the French Court. We do not believe that Overseas Union v. New Hampshire [1992] 1 QB 434 and The Maciej Rataj [1995] 1 Lloyds Rep 302 provide a clear answer to these questions.

For these reasons, we refer for the ruling of the European Court the following questions:

1. Does the exception in Article 1(4) of the Brussels Convention extend to proceedings commenced before the English Courts seeking:

    (a) a declaration that the commencement and continuation of proceedings before a French Court constitutes a breach of an arbitration agreement;

    (b) an injunction restraining the Appellants from continuing the proceedings before the French Court, or instituting any further proceedings before any other Court, in breach of the arbitration agreement.

If not,

2. Do such proceedings constitute the same cause of action as a challenge to the jurisdiction of the French Court founded on the same arbitration agreement, so as to require the English Court to stay the proceedings pursuant to Article 21 of the Convention?

ORDER: Appeal referred to the European Court.

(Order Not part of approved judgment)

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