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[COURT OF APPEAL]

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT m.b.H. v. R'AS al-KHAIMAH NATIONAL OIL CO.

SAME v. SAME (SHELL INTERNATIONAL PETROLEUM CO. LTD. INTERVENING)

[1986 D No. 2196]
[1987 R No. 273]

1987 March 9, 10, 11, 12; 24

Sir John Donaldson M.R., Woolf and Russell L.JJ.

Arbitration—Award—Enforcement—Award made abroad—Proper law applicable to arbitration left to determination of arbitrators—Arbitrators selecting internationally accepted principles of law governing contractual relations as proper law applicable—Arbitrators making award in favour of plaintiffs—Whether award enforceable—Whether enforcement of award contrary to public policy

Injunction—Interlocutory—Asset within jurisdiction—Injunction restraining removal of assets from jurisdiction—Debt payable outside jurisdiction by company resident within jurisdiction—Whether debt asset within jurisdiction

In 1976 the plaintiffs and the defendants, both foreign companies, entered into an agreement for the exploration of oil in the state of R'As al-Khaimah. The agreement contained a clause providing for the settlement of all disputes by three arbitrators appointed in Geneva under the rules of the International Chamber of Commerce, to whom was left the determination of the proper law to be applied. In March 1979, the plaintiffs referred a dispute to arbitration in Geneva in accordance with the clause. The arbitrators chose as the proper law of the contract what they described without further definition as "internationally accepted principles of law governing contractual relations" and made a substantial award in favour of the plaintiffs. But in April 1979 the defendants instituted proceedings in a court in R'As al-Khaimah and obtained rescission of the whole agreement and damages on the ground of misrepresentation. Neither party took any part in the proceedings instituted by the other, and neither the award nor the judgment was enforced. In June 1986, the plaintiffs discovered that an English company, S. Ltd., had been buying petroleum from and therefore owed money to the defendants. With the intention of satisfying the arbitration award out of payments due to the defendants from S. Ltd., the plaintiffs thereupon applied for and were granted leave to enforce the award in England as a judgment. They also obtained an injunction restraining the defendants from removing any assets from the jurisdiction. The defendants meanwhile obtained leave to serve a writ out of the jurisdiction on the plaintiffs, claiming enforcement of the R'As al-Khaimah court judgment. The defendants' applications to discharge the injunction and to set aside the leave granted to the plaintiffs to enforce their arbitration award were refused, while the plaintiffs' application to set aside the leave granted to the defendants to serve their writ out of the jurisdiction was granted. The defendants appealed, objecting to the choice of proper law in the arbitration. S. Ltd. intervened to support the defendants' opposition to

continuation of the injunction, on the ground that as the debt owed by S. Ltd. to the defendants was payable in New York it was not an asset susceptible to such an injunction and was not enforceable by the English courts.

On the appeals:—

Held, dismissing the appeals, (1) that in considering whether to enforce an arbitration award made pursuant to an agreement which purported to provide that the rights of the parties should be governed by a system of law which was not that of England or of any other state or was a serious modification of such a law, the court had to be satisfied that the parties intended to create legally enforceable rights and obligations, that the resulting agreement was sufficiently certain to constitute a legally enforceable contract and that it would not be contrary to public policy to use the coercive powers of the state to enforce the award; that, on the facts, the parties had intended, and the agreement was sufficiently certain, to constitute a legally enforceable contract; and that since the Swiss arbitrators' choice for the proper law of the arbitration, being a common denominator of principles underlying the law of contract of various nations, was within the scope of the decision left to them by the parties, their award could not be regarded as unenforceable on the ground of public policy (post; pp. 1035E—1036A, 1041B,).

(2) That a debt which was enforceable within the jurisdiction by garnishment or the appointment of a receiver constituted an asset within the jurisdiction; that since the debt owed by S. Ltd. to the defendants, albeit payable outside the jurisdiction, could be enforced within the jurisdiction if S. Ltd. were to default on its obligation to pay, and since the indebtedness of S. Ltd. would be completely discharged if the debt were to be made the subject of a garnishee order which was then made absolute and payment made to the plaintiffs thereunder, that debt constituted an asset within the jurisdiction which could properly be made the subject of an injunction to restrain its disposal or removal from the jurisdiction (post, pp. 1038D–E, 1039B–C, 1040E—1041B).

Orders of Bingham and Leggatt JJ. affirmed.

The following cases are referred to in the judgments:

Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1981] 2 Lloyd's Rep. 446

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909; [1981] 2 W.L.R. 141; [1981] 1 All E.R. 289, H.L.(E.)

Bullus v. Bullus (1910) 102 L.T. 399

Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. [1971] A.C. 572; [1970] 3 W.L.R. 389 [1970] 3 All E.R. 71, H.L.(E.)

Czarnikow v. Roth Schmidt & Co. [1922] 2 K.B. 478, C.A.

Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd. [1978] 1 Lloyd's Rep. 357, C.A.

Hamlyn & Co. v. Talisker Distillery [1894] A.C. 202, H.L.(E.)

Hillas & Co. Ltd. v. Arcos Ltd. (1932) 147 L.T. 503, H.L.(E.)

Intraco Ltd. v. Notis Shipping Corporation [1981] 2 Lloyd's Rep. 256

Lister & Co. v. Stubbs (1890) 45 Ch.D. 1, C.A.

Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213n, C.A.

Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.

Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep. 257

Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ltd. [1933] 1 K.B. 47, C.A.

Richardson v. Mellish (1824) 2 Bing. 229

S.C.F. Finance Co. Ltd. v. Masri (No. 3) [1987] 2 W.L.R. 81; [1987] 1 All E.R. 194, C.A.

Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K.B. 673

Z Ltd. v. A-Z and AA-LL [1982] Q.B. 558; [1982] 2 W.L.R. 288; [1982] 1 All E.R. 556, C.A.

The following additional cases were cited in argument:

A v. B (X intervening) [1983] 2 Lloyd's Rep. 532

Ashtiani v. Kashi [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970, C.A.

Avant Petroleum Inc. v. Gatoil Overseas Inc. [1986] 2 Lloyd's Rep. 236, C.A.

Bankers and Shippers Insurance Co. of New York v. Liverpool Marine and General Insurance Co. Ltd. (1926) 24 Ll.L.Rep. 85

Galaxia Maritime S.A. v. Mineralimportexport (The Eleftherios) [1982] 1 W.L.R. 539; [1982] 1 All E.R. 796, C.A.

Helbert Wagg & Co. Ltd., In re [1956] Ch. 323; [1956] 1 All E.R. 129

Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. (The Angel Bell) [1981] Q.B. 65; [1980] 2 W.L.R. 488; [1980] 1 All E.R. 480

Martin v. Nadel (Dresdner Bank Garnishees) [1906] 2 K.B. 26, C.A.

New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101

Ninemia Maritime Corpn. v. Trave Schiffahrtsgesellschaft mbH & Co. K.G. [1983] 1 W.L.R. 1412; [1984] 1 All E.R. 398, C.A.

Orwell Steel (Erection & Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd. [1984] 1 W.L.R. 1097; [1985] 3 All E.R. 747

Power Curber International Ltd. v. National Bank of Kuwait S.A.K. [1981] 1 W.L.R. 1233; [1981] 3 All E.R. 607

Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of The Republic of Indonesia intervening) [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.

Searose Ltd. v. Seatrain (U.K.) Ltd. [1981] 1 W.L.R. 894; [1981] 1 All E.R. 806

Stewart Chartering Ltd. v. C. & O. Managements S.A. [1980] 1 W.L.R. 460; [1980] 1 All E.R. 718

Tramountana Armadora S.A. v. Atlantic Shipping Co. S.A. [1978] 2 All E.R. 870

Union Nationale des Co-operatives Agricoles de Cereales v. Robert Catterall & Co. Ltd. [1959] 2 Q.B. 44; [1959] 1 All E.R. 721, C.A.

APPEALS from Leggatt and Bingham JJ.

In the first appeal, the defendants, R'As al-Khaimah National Oil Co., appealed against orders made by Leggatt J. on 26 February 1987 whereby he (i) refused to discharge an order made by Bingham J. on 2 July 1986 granting the plaintiffs, Deutsche Schachtbau-und Tiefbohr-gesellschaft m.b.H., leave to enforce as a judgment an award made on 4 July 1980 by an arbitral tribunal in Geneva who held that the defendants should pay the sum of U.S.$4,635,664 to the plaintiffs, and (ii) set aside an order made by Staughton J. on 22 January 1987 granting the defendants leave to issue and serve without the jurisdiction a writ claiming from the plaintiffs sums allegedly due to the defendants under a judgment of the court of R'As al-Khaimah dated 3 December 1979. In the second appeal, the defendants and the interveners, Shell International

Petroleum Co. Ltd., appealed against an order made by Bingham J. on 8 August 1979 whereby he refused to discharge an injunction, granted by him on the ex parte application of the plaintiffs on 2 July 1986 and amended on 25 July 1986, restraining the defendants from accepting payment of a debt owed to them by the interveners and payable in New York, pending the outcome of the plaintiffs' application to enforce the Geneva arbitration award.

The facts are set out in the judgment of Sir John Donaldson M.R.

Andrew Longmore Q.C., *Alan Pardoe* and *Adrian Hughes* for the defendants.

David Johnson Q.C. and *Mark Havelock-Allan* for Shell.

Stewart Boyd Q.C. and *Ian Glick* for the plaintiffs.

Cur. adv. vult.

24 March. The following judgments were handed down.

SIR JOHN DONALDSON M.R. Disputes arose between Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. ("D.S.T.") and R'As al-Khaimah National Oil Co. ("Rakoil") under an oil exploration agreement dated 1 September 1976. The agreement contained an International Chamber of Commerce ("I.C.C.") arbitration clause and, in March 1979, D.S.T. referred its claims to an arbitral tribunal sitting in Geneva. In April 1979 Rakoil instituted proceedings in the court of R'As al-Khaimah for the rescission of the agreement upon the ground that it had been obtained by misrepresentation and also for damages. Neither party took any part in the proceedings instituted by the other. D.S.T. succeeded in the arbitration, the award dated 4 July 1980 being for U.S.$4,635,664. Rakoil succeeded in the litigation, judgment being given on 3 December 1979 whereby the agreement, or perhaps more accurately an earlier underlying agreement, was rescinded and D.S.T. were held liable to Rakoil in the sum of U.S.$1,424,891.23 and Dirhams 110,687,839.61.

At this stage honour, but little else, was satisfied, since neither party could find a way of enforcing these decisions. That situation might have continued indefinitely, but for the fact that in about June 1986 rumours reached D.S.T. that Shell International Petroleum Co. Ltd. ("Shell") had been buying oil from Rakoil and would, presumably, be paying for that oil. Shell was an English subsidiary of the Anglo-Dutch group and D.S.T. set about trying to satisfy the award out of Shell's payments to Rakoil.

On 2 July 1986, on the ex parte application of D.S.T., Bingham J. made orders: (i) pursuant to R.S.C., Ord. 73, r.10 and section 3(1)(*a*) of the Arbitration Act 1975, granting leave to D.S.T. to enforce the Geneva arbitration award in the same manner as a judgment for the sum awarded, together with interest thereon amounting to a further sum of U.S.$3,778,366.49; and (ii) restraining Rakoil from

> "removing outside the jurisdiction, disposing of, charging or otherwise dealing with any moneys owned by them or deposited by them within the jurisdiction, or any debts due or to become due to them within, or from any person within the jurisdiction [and in particular from directing, accepting or receiving payment of the

A debt or debts due or to become due to them from Shell International Petroleum Co. Ltd. or any other company or corporation resident in England and Wales] up to the amount of U.S.$8,500,000."

The words in square brackets were added by a further order of Bingham J. made on 24 July 1986, again on the ex parte application of D.S.T.

B On 8 August 1986 Bingham J. refused an application to discharge this injunction, noting that there was a pending application to set aside that part of his order dated 2 July 1986, which had given D.S.T. leave to enforce the arbitration award as a judgment. That application to set aside was heard by Leggatt J. on 25 February 1987.

Meanwhile, on 22 January 1987, Rakoil applied for and obtained the C leave of Staughton J. to issue a writ for service on D.S.T. in Germany claiming to enforce the R'As al-Khaimah judgment. The intention was to found a counterclaim to that based upon the award. An application to set aside that leave and all subsequent proceedings came before Leggatt J. at the same time as the application to set aside the leave to enforce the award as a judgment.

Leggatt J. refused to set aside the leave granted to D.S.T. to enforce D the award and set aside the leave to serve the writ issued by Rakoil against D.S.T. However he imposed a stay on execution of the award until after the hearing of an appeal to this court against the refusal of Bingham J. to discharge the injunction. That appeal was due to be heard on 9 March 1987.

The reality was, and is, that D.S.T. has to uphold the validity of the E orders both of Bingham J. and Leggatt J. if they are to enjoy any fruits of this litigation. If the leave to enforce the award is set aside, cadit quaestio. If the injunction is set aside, any assets of Rakoil in this country will disappear overseas in the twinkling of a telex.

Accordingly arrangements were made for the appeal from the judgment of Leggatt J. to be heard at the same time as that from the judgment of Bingham J.

F Meanwhile Shell were subjected to substantial commercial pressure to pay Rakoil in New York and, on their application, were given leave to intervene in the appeal against the grant and continuance of the injunction, which was inhibiting them from so doing. Thus the scene was set for an appeal which has raised issues of some general importance and which has been argued with great skill by all concerned.

G The logical starting point for a consideration of those issues must be the order giving leave to enforce the award and the refusal to set it aside.

Enforcement of the award

The Geneva award is a "Convention award" within the meaning of H the Arbitration Act 1975, being an award made in pursuance of an arbitration agreement in the territory of a state, other than the United Kingdom, namely Switzerland, which is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It follows that it is enforceable in England either by action or under section 26 of the Arbitration Act 1950 and that such enforcement is mandatory, save in the exceptional cases listed in section 5 of the Arbitration Act 1975. Section 5 provides, so far as is material:

"The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

This suggests that the parties intended to delegate to the arbitrators the choice of law governing the substantive contract, applying what they considered to be appropriate principles and, in the event, the arbitrators did not hold that the contract was governed by the law of R'As al-Khaimah.

Giving the fullest possible weight to any argument favouring the law of R'As al-Khaimah as the proper law of the substantive contract and to the fact that it was undoubtedly the law of the place of performance, I find myself in complete agreement with Leggatt J. that the proper law of the arbitration is Swiss.

Effect of the judgment of the court of R'As al-Khaimah

Once it is decided that the agreement to arbitrate is governed by Swiss law, the judgment becomes irrelevant to the validity of that agreement, whether the judgment is viewed as a judgment of a court of competent jurisdiction or as an expert opinion upon the law of R'As al-Khaimah. In terms of Swiss law, which is the only relevant law in the context of the validity of the arbitration agreement, the affidavit evidence of Professor Pierre Lalive is that the arbitration agreement is valid and that this validity is unaffected by any question as to the validity of the contract of which it forms part. This evidence stands uncontradicted. Furthermore no application was made to cross-examine him on his affidavit.

The judgment has, however, to be considered in the context of the decision by Leggatt J. to set aside the leave to serve the writ outside the jurisdiction seeking to enforce it by way of counterclaim. At this point it becomes necessary to look, albeit briefly, at section 32 of the Civil Jurisdiction and Judgments Act 1982. This, so far as is material, provides:

"(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if (*a*) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and (*b*) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and (*c*) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court. (2) Subsection (1) does not apply where the agreement referred to in paragraph (*a*) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given. (3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2)."

A The bringing of proceedings by Rakoil in the court of R'As al-Khaimah was a breach of the arbitration agreement, whose scope was amply wide enough to cover all matters in dispute in those proceedings, and accordingly the judgment cannot be recognised or enforced. It follows that Leggatt J. was right to set aside the leave to serve the writ out of the jurisdiction and the R'As al-Khaimah judgment disappears from the scene.

B

The scope of the award and of the arbitration agreement

Mr. Longmore submits that the award deals with a difference or differences not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration and that it is not possible to C separate such matters from those falling within the true scope of the agreement. Accordingly enforcement should be refused (section 5(2)(*d*) and (4) of the Arbitration Act 1975) or at the very least there should not be summary enforcement.

The claim in the arbitration was made by D.S.T. on its own behalf and as agent for and representative of a group of companies including a D German company to which I will refer as "Deminex." Deminex, unlike the other companies in the group, does not appear to have been a party to the arbitration agreement. The award also mentioned a company called "Sea & Land" and notes that it had a contract with the Government of R'As al-Khaimah which had not been submitted to arbitration. It appears from the award that both Deminex and Sea & Land were members of a consortium of which D.S.T. was the leader.

E The interest of Deminex was challenged in a letter to the Secretary General of the I.C.C. dated 5 April 1979 from the English solicitors of Rakoil. That letter was brought to the attention of the arbitrators and is mentioned in the award. They were also aware that Sea & Land was not a party to the dispute and it is not apparent to me that D.S.T. was ever claiming on behalf of Sea & Land.

F Rakoil has never denied the fact that D.S.T. was a party to the arbitration agreement and the award determines only the rights of D.S.T. and Rakoil inter se. It makes no award in favour of Deminex or Sea & Land and makes no determination of the rights of Deminex or Sea & Land against D.S.T. If the arbitrators have erred in the amount awarded to D.S.T., because they have wrongly taken account of the interests of Deminex or Sea & Land, that is a matter which should have G been the subject of a claim to relief from the Swiss court. No such application has been made. The burden of proving any excess of jurisdiction lies on the person seeking to resist the enforcement of the award. In the light of the failure to apply to the Swiss courts, of the evidence of Professor Pierre Lalive as to the wide powers of arbitrators under Swiss law, of the fact that the award is made solely in favour of D.S.T. and of the terms of the award itself from which it seems that the H arbitrators have held that D.S.T. had independent rights as "the operator," I am not satisfied that there has been any excess of jurisdiction. This objection therefore fails.

Public policy in relation to the enforcement of the award

In pursuance of their duty under article 13.3 of the I.C.C. rules, the arbitrators determined that the proper law governing the substantive

obligations of the parties was "internationally accepted principles of law governing contractual relations." The arbitrators prefaced this decision with the following statement:

> "The arbitration tribunal holds that: The Concession Agreement, the Assignment Agreement and the 1976 Operating Agreement are contracts between, on one hand, a number of companies organised under various laws, and, on the other hand, a state respectively a company which is actually an agency of such state. Reference either to the law of any one of the companies, or of such state, or of the state on whose territory one or several of these contracts were entered into, may seem inappropriate, for several reasons. The arbitration tribunal will refer to what has become common practice in international arbitrations particularly in the field of oil drilling concessions, and especially to arbitrations located in Switzerland. Indeed, this practice, which must have been known to the parties, should be regarded as representing their implicit will. Reference is made in particular to the leading cases of *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1967) 35 Int'l.L.Rep. 136 and *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic* (1979) Int'l.L.Rep. 389. See also Lalive, *Les Règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse, L'arbitrage international privé et la Suisse* (1977); see also Derains, *L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige,* in *Revue de l'arbitrage* (1972), p. 100."

Mr. Longmore submits that it would be contrary to English public policy to enforce an award which holds that the rights and obligations of the parties are to be determined, not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law.

In *Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemere Verzekgringeen* [1962] 2 Lloyd's Rep. 257 Megaw J. was confronted with an arbitration agreement whereby:

> "The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of the law. They shall settle any dispute under this agreement according to an equitable rather than a strictly legal interpretation of its terms and their decision shall be final and not subject to appeal."

The umpire had refused to state his award in the form of a special case and the respondents to an application that he be ordered to do so submitted that no substantial or defined question of law arose. Megaw J. referred to the classic decision of this court in *Czarnikow v. Roth Schmidt & Co.* [1922] 2 K.B. 478 and, in the tradition of that decision and indeed of the English courts throughout the ages, roundly declared [1962] 2 Lloyd's Rep. 257, 265:

> "so long as there is supervisory jurisdiction by the courts, the parties cannot make a question of law any less a question of law, whether for the purpose of the exercise of the courts' discretion or otherwise, by purporting to agree that it shall be decided by some extra-legal criterion."

A However, Megaw J. also considered the clause in a different context, namely, whether the courts would give effect to such a clause. Referring again to the *Czarnikow* case he said, at p. 264:

> "The conclusion which I draw from those judgments is that it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognizable system of
B law, which primarily and normally would be the law of England, and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles, which, of course, does not mean 'equity' in the legal sense of the word at all. This conclusion is, I think, supported by the judgment of Goddard J. in the case of *Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865* (1935)
C 52 Ll.L.Rep. 16. I am not going to go into that case in detail. The arbitration clause there contained words very similar to the words in the present article 17, and they were as follows: 'The arbitrators or umpire, as the case may be, shall interpret this treaty rather as an honourable engagement than as a merely legal obligation, and shall be relieved from all judicial formalities, and may abstain from
D following the strict rule of the law.' At p. 20 of the report, Goddard J. deals with the effects of that part of the arbitration clause, and, as I read his judgment, he is saying there that the effect of it is not in any way to alter the requirement that English law shall be applied in the decision of disputes by an English arbitration tribunal. I agree with Mr. Evans's submission that parties can validly provide for some other system of law to be applied to an arbitration
E tribunal. Thus, it may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the whole, of their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; for example, in a contract to which a sovereign state was a party. It may well be that the arbitral tribunal
F could properly give effect to such an agreement, and the court in its supervisory jurisdiction would also give effect to it, just as it would give effect to a contractual provision in the body of the contract that the proper law of the contract should be some system of foreign law. Indeed, it might be another way of achieving the same result, and I see no reason why an arbitral tribunal in England should not, in a proper case, where the parties have so agreed,
G apply foreign law or international law. Of course, also, as Mr. Evans again suggested, the parties can by their contract, either in the arbitration clause itself or in the rest of the contract, provide that certain incidents of law which would otherwise attach should not attach, such as the exclusion or alteration of the statutory period of limitation, or the exclusion of the implied terms of section
H 14 of the Sale of Goods Act 1893, or suchlike matters. There is no possible objection to that, so long as there is nothing contrary to public policy in the exclusion or alteration of the provisions which, in the absence of agreement, would attach. But this is not such a case. If the parties choose to provide in their contract that the rights and obligations shall not be decided in accordance with law but in accordance with some other criterion, such as what the arbitrators consider to be fair and reasonable, whether or not in accordance

with law, then, if that provision has any effect at all, its effect, as I see it, would be that there would be no contract, because the parties did not intend the contract to have legal effect—to affect their legal relations. If there were no contract, there would be no legally binding arbitration clause, and an 'award' would not be an award which the law would recognise." A

A clause in the same terms was considered in this court in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Lloyd's Rep. 357, where Lord Denning M.R., with the agreement of Goff L.J. and Shaw L.J. said, at p. 362: B

"I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is a perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for parties so to agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this. Even under an ordinary arbitration submission, it was a mistake for the courts in the beginning to upset awards simply for errors of law. See what Williams J. and Willes J. said in *Hodgkinson v. Fernie* (1857) 3 C.B.N.S. 189, 202, 205. That mistake can be avoided by such a clause as this: for, as Scrutton L.J. said in *Czarnikow v. Roth Schmidt & Co.* [1922] 2 K.B. 478, the parties can, by express provision, authorise arbitrators to depart from the strictnesses of the law. So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation. I realise, of course, that this lessens the points on which one party or the other can ask for a case stated. But that is no bad thing. Cases stated have been carried too far. It would be to the advantage of the commercial community that they should be reduced: and a claim (sic. ?clause) of this kind would go far to ensure this." C D E F

In my judgment there are three questions which the court has to ask itself when confronted with a clause which purports to provide that the rights of the parties shall be governed by some system of "law" which is not of England or any other state or is a serious modification of such a law. G

1. *Did the parties intend to create legally enforceable rights and obligations?*

If they did not, there is no basis for the intervention of the coercive power of the state to give effect to those "rights and obligations." An intention not to create legally enforceable rights and obligations may be expressed—"this agreement is binding in honour only"—or it may be implied from the relationship between the parties or from the fact that the agreed criteria for the determination of the parties' rights and obligations are too vague or idiosyncratic to have been intended as a basis for the creation of such rights and obligations. H

2. *Is the resulting agreement sufficiently certain to constitute a legally enforceable contract?*

This question assumes that the parties *intended* to create a legally enforceable relationship, but is addressed to the problem of whether the terms of their agreement are too uncertain to produce such a result. However, given that this was the intention of the parties, the courts will not be "too astute or too subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat: *per* Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, 514. In this context another maxim is relevant—id certum est quod certum reddi potest—and there is a vital distinction between an agreement to agree in future and an agreement to accept terms to be determined by a third party. The former cannot and the latter can form the basis for a legally enforceable agreement.

3. *Would it be contrary to public policy to enforce the award, using the coercive powers of the state?*

Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in *Richardson v. Mellish* (1824) 2 Bing. 229, 252, "It is never argued at all, but when other points fail." It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

Asking myself these questions, I am left in no doubt that the parties intended to create legally enforceable rights and liabilities and that the enforcement of the award would not be contrary to public policy. That only leaves the question of whether the agreement has the requisite degree of certainty. By choosing to arbitrate under the rules of the I.C.C. and, in particular, article 13.3, the parties have left proper law to to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators' choice of proper law—a common denominator of principles underlying the laws of the various nations governing contractual relations—is outwith the scope of the choice which the parties left to the arbitrators.

I have dealt with the matter in general terms, because Mr. Boyd told us that this was a matter of considerable importance to those engaged in international commerce. But it would appear that in the instant case the decision of the arbitrators rested primarily, if not exclusively, on findings of fact including a finding that there was no such mis-representation as was alleged by Rakoil as a ground for its contention that both the substantive agreement and the arbitration agreement were voidable.

Summary enforcement

Should the award be enforced summarily or should D.S.T. be left to sue on the award? The remedy under section 26 of the Arbitration Act 1950 is indeed a summary remedy and if there were matters which

required a further investigation which could only appropriately be undertaken by proceedings begun by writ, I would have been in favour of allowing the appeal, but I have been unable to detect any such matters.

For these reasons I would dismiss the appeal from the judgment of Leggatt J.

The injunction

On 22 May 1975 in *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 W.L.R. 1093, a Court of Appeal consisting of Lord Denning M.R., Browne L.J. and Geoffrey Lane L.J. granted the first *Mareva* injunction, Lord Denning M.R. saying, at p. 1094:

> "We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant *in advance of judgment* or to restrain the disposal of them . . . It seems to me that the time has come when we should revise our practice." (My emphasis)

On 23 June 1975 in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, a Court of Appeal consisting of Lord Denning M.R., Roskill L.J. and Ormrod L.J. had its attention drawn to *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1 in which Cotton L.J. had said, at p. 13:

> "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

Lord Denning M.R. adverted to his earlier decision, saying [1975] 2 Lloyd's Rep. 509, 510:

> "If it *appears* that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it *before judgment*—the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets." (My emphasis again).

I mention this at the outset because, although it was convenient to refer to the order made by Bingham J. as a *Mareva* injunction, and it was so referred to throughout the argument, it is at least doubtful whether it falls into that category. The *Mareva* innovation, which time has shown to be one of the most imaginative, important and, on the whole, most beneficient of modern times, lay in giving a plaintiff some degree of protection *before* he became a judgment creditor and in anticipation that he would become one. Judgment creditors had little need of new protection since they were usually adequately protected by their right to levy execution by a writ of fi fa, attachment of debts or the appointment of a receiver. And where they were not, the court has intervened by injunction to prevent the payment to and receipt by the judgment debtor of an asset in circumstances in which it would not otherwise have been available to the judgment creditor in satisfaction of the judgment debt: *Bullus v. Bullus* (1910) 102 L.T. 399.

A Once Bingham J. had given D.S.T. leave to enforce the award as a judgment, as he did in the same order as that granting the injunction, D.S.T. became judgment creditors of Rakoil, albeit subject to a suspension of their right to levy execution and subject to the possibility that the order giving them this status might be set aside on the application of Rakoil. It was not the case that D.S.T. would become B judgment creditors if and when Rakoil failed to set the order aside. Once the order was made, D.S.T. were in precisely the same position as any plaintiff who has obtained judgment, subject to a stay pending an application to the Court of Appeal to set the judgment aside.

Bingham J. did not rest his decision on this point, but it has been raised by the respondent's notice of D.S.T. and could be material to the exercise of discretion. On the approach adopted by the judge, namely C that he was concerned with an application for a *Mareva* injunction and that the claim of D.S.T. was based upon an award which would not necessarily be enforceable as a judgment, the first question to be considered was whether Rakoil had any assets within the jurisdiction, either when the injunction was granted on 2 July, when it was varied on 25 July or when it was affirmed on 8 August 1986. The only asset which D has ever been suggested was the trading debt owed by Shell to which I referred at the outset of this judgment. On 2 July the evidence about this was "somewhat vague," taking more definite shape by 25 July. However it was only on 8 August that the real point emerged. This was that, whilst the trading debt was very much an asset—it was worth U.S.$4,843,051.10—it was not, according to Rakoil, an asset within the E jurisdiction. There was also a subsidiary point, more fully deployed in this court, that only part of the debt, U.S.$662,751.54, was an asset of Rakoil, the remainder being assets of the government of R'As al-Khaimah or of the R'As al-Khaimah Gas Commission.

The advent of Shell as an intervener in the appeal has further clarified the facts and we now know that there were two shipments of oil F at the Hulaylah Terminal, R'As al-Khaimah, one on board the *Euro Pride* covered by two bills of lading dated 16 June 1986 and the other on board the *Nichitima Maru* covered by two bills of lading dated 29 June 1986. The sales were f.o.b. under a contract governed by English law and the payment term was:

> G "Due within 30 days of bill of lading date against receipt of telexed invoice, documents of title and other shipping documents as agreed or in the absence of these documents, buyer to accept seller's debt of indemnity in a form acceptable to buyer. Payment to be made by telegraphic transfer to seller's nominated account."

We also now know, from an affidavit of Mr. D. S. S. Reid, Shell's H Vice-President of Products Trading:

> "[Shell] do not maintain bank accounts for oil trading within the jurisdiction. All of their trading is conducted in US dollars and the funds which they use for this purpose are located in bank accounts in New York. In the normal course of business [Shell] would have given instructions from their London office for [Rakoil's] invoices to be paid by telegraphic transfer from [Shell's] New York bank

accounts to the bank accounts in New York nominated by [Rakoil] in each invoice, as and when the date for payment fell due." A

There were four invoices addressed by Rakoil to Shell, the two which related to the *Euro Pride* shipments being dated 18 June 1986 and the two which related to the *Nichitima Maru* shipments being dated 29 June 1986. All four invoices called for payment

"30 days from bill of lading by telegraphic transfer to Account No. 6051395 with Brown Brothers Harriman & Co., 59 Wall Street, New York, account The National Bank of R'As al-Khaimah, favouring . . ." B

the favoured one being named as Rakoil in the case of one invoice, the government of R'As al-Khaimah in the case of two other invoices and the R'As al-Khaimah Gas Commission in the case of the fourth invoice. C

I can dispose at once of the submission that this was or may not have been an asset of Rakoil. Shell say that the supply agreement under which they took the oil was between them and Rakoil and the invoices were raised by Rakoil. There may indeed be contractual arrangements between Rakoil on the one hand and the government of R'As al-Khaimah and the R'As al-Khaimah Gas Commission on the other, whereby Rakoil is accountable to the government and to the commission for part of the receipts from Shell, but the evidence does not give rise to any doubt but that Shell's indebtedness was to Rakoil as a principle. D

The issue, however, remains of whether this indebtedness constituted an asset of Rakoil situated within the jurisdiction. This falls to be considered as a matter of the English law governing conflicts of law and is intimately bound up with the allied question of whether the debt could be taken in execution of an English judgment in favour of D.S.T. by garnishment or the appointment of a receiver, since it would not be right to maintain an injunction if the debt could not be so taken. E

So far as the law of garnishment is concerned, Mr. Boyd submitted, and I would accept, that the only relevant jurisdictional requirements are that the garnishee shall be "within the jurisdiction" and that the subject matter should be a "debt due or accruing due to the judgment debtor from the garnishee": see R.S.C., Ord. 49, r. 1(1). However, as a matter of discretion, a garnishee order will not be made against such a person if it would not operate to discharge the garnishee in whole or pro tanto from his liability in respect of the debt. Such a situation can arise where the garnishee, although himself within the jurisdiction, is not indebted within that jurisdiction: *S.C.F. Finance v. Masri (No. 3)* [1987] 2 W.L.R. 81, 95–96 and *Swiss Bank Corporation v. Boehmische Industrial Bank* [1923] 1 K.B. 637, 680–681. F G

This problem of double jeopardy is much less serious than it might otherwise be, because garnishment is a process which is recognised internationally and most nations will give effect to a rule similar to that of English law, namely, that "the validity and effect of an attachment or garnishment of a debt are governed by the lex situs of the debt" (*Dicey & Morris, The Conflict of Laws*, 10th ed., r. 84) and that debts "generally are situate in the country where, they are properly recoverable or can be enforced" (*Dicey & Morris*, r. 76(1)). A complication and exception arises where the debtor carries on business in more than one jurisdiction. In such a case, if the creditor has expressly or impliedly H

A stipulated for payment at one of those places, the debt will be held to be there situate. Happily that complication does not arise in the instant appeal, since Shell asserts, with all the emphasis born no doubt of a desire to avoid adverse consequences under United States fiscal and other laws, that it does not carry on business in New York. It is simply owed money by New York bankers.

B If, perish the thought, Shell were to default upon its obligation to pay Rakoil for the oil which it has bought and received, its liability could certainly be enforced in this country and possibly only in this country. Certainly there is no suggestion that it could be enforced in New York. It follows that, but for the stay of execution, the debt could have been the subject of a garnishee order in this country and that if the order were made absolute and payment was made to D.S.T. thereunder, C the indebtedness of Shell would be discharged for all purposes.

Mr. Johnson, appearing for Shell, reserves the right to challenge the correctness of this analysis which rests upon authority which is not binding upon the House of Lords. However, he also submits that even if this debt is technically an asset of Rakoil situated within the jurisdiction, this is too narrow and legalistic an approach to apply to a commercial D transaction. Shell will not default and would indeed have paid in July 1986, but for the fact that it was prevented from doing so by the injunction. A chose in action or even a debt is only of commercial value to the extent that it produces money or a credit and this debt would never have produced either in England. Rakoil would have received this benefit in New York.

He then referred us to the decisions of this court in *Z Ltd. v. A-Z* E *and AA-LL* [1982] Q.B. 558 and *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256 as indicating that *Mareva* injunctions should be drawn in terms which leave banks free to honour their obligations under letters of credit and bank guarantees, whilst restricting the use which beneficiaries can make of payments received by them from the banks. By a parity of reasoning, the court should not F interfere with the performance by Shell of its commercial obligations and should only concern itself with the payment for the oil when it had come into the hands of Rakoil—in New York.

The ratio of the decision in *Intraco Ltd.'s* case is set out at p. 257:

> "Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable G letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand."

I could have added that it is not only the beneficiary of the credit who H relies upon the bank's engagement not to revoke it. Third parties may, and often do, deal with the beneficiary on the faith of the fact that, come what may, he will be paid under the letter of credit. The decision in *Z Ltd. v. A-Z* adds nothing to this, save to extend the principle, obiter, to bank credit cards.

The obligation undertaken by Shell towards Rakoil was not of this character. Indeed Mr. Boyd illustrated this neatly by taking an imaginary scenario in which a *Mareva* injunction is granted restraining Mr. X,

resident in the United Arab Emirates, from removing his assets from the jurisdiction. He has given his London bank a standing order requiring the making of monthly payments in U.S. dollars to Mr. Z in New York. Such an order is revocable and the effect of the injunction is to revoke it: *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj and the Bank for Russian Trade Ltd.* [1933] 1 K.B. 47. The fact that the bank would, in the ordinary course of events, have complied with the order by making payments out of an account with another bank which it maintained in New York for the purpose of making such payments, is irrelevant. Assuming in favour of Rakoil that others had an interest in the New York account to which payments were to be made, those others can be substituted for Mr. Z, Rakoil for Mr. X and Shell for the bank. There is nothing special about the relationship between Shell and Rakoil. Like that of the bank and Mr. X, it is simply one of debtor and creditor.

Some argument was addressed to us on the basis that on 2 July 1986, when the injunction was imposed, the debt had not yet arisen and so, it was said, there was no subject matter for the injunction which, accordingly, should not have been granted. It would also follow, although this was not stressed on behalf of Rakoil, that when the time for payment arrived and there was a debt, Shell would at once pay that debt and extinguish it. The interval of time between the debt arising and its extinction would be so short that no injunction could effectively be imposed.

The fallacy of this line of argument is that it confuses indebtedness with a right to payment and ignores the fact that a debt is a debt whether it is due or merely accruing due. If the customer of a bank is in credit, the bank is indebted to him even if there is no obligation to pay until the customer demands payment. Shell was indebted to Rakoil from the moment when, on or about 18 and 29 June 1986, it took delivery of the oil f.o.b.

There remains only the exercise of discretion. Shell did not seek to intervene in the court below and Bingham J. did not therefore have to consider their representations. For my part I accept that they are under commercial pressure to pay, but not that any court to whose jurisdiction they may be subject would fail to recognise the jurisdiction of the English courts to extinguish their indebtedness to Rakoil by a garnishee order and to restrain payment by Shell meanwhile. Commercial pressure is to be distinguished from double jeopardy by legal process and does not, in my judgment, provide any reason to refrain from upholding the injunction.

In administering the *Mareva* jurisdiction, the courts have rightly been mindful that the object of the exercise has been to prevent "cheating" by defendants—dissipating assets, causing them to "disappear" into the pockets of others, removing them from the jurisdiction and so on. It has not been to provide advance security for the satisfaction of a judgment debt which has not yet arisen. Accordingly, in appropriate cases injunctive orders have been drawn so as to permit ordinary trading debts to be incurred and discharged and the use of assets for living expenses. However it is for the defendant to apply for such exceptions to the generality of the injunctive order and Rakoil has made no such application.

The case for imposing an injunction was much stronger than Bingham J. thought that it was, because D.S.T. were actual and not

potential judgment creditors. The purpose of the injunction was thus to maintain the status quo during the period covered by the stay of execution and not to preserve assets against the probability that D.S.T. might at some later date be able to establish its claim—the ordinary *Mareva* situation.

Accordingly I would dismiss this further appeal.

WOOLF L.J. I agree.

RUSSELL L.J. I also agree.

Appeal dismissed.
Leave to appeal refused.

6 May. Shell adduced further evidence showing that judgment had been obtained against them by the government of R'As al-Khaimah in that country's local courts in respect of the debt owed by them. The Court of Appeal granted Shell's application for leave to appeal to the House of Lords and lifted the stay of execution in respect of the injunction of 24 March 1987 to allow the commencement of garnishee proceedings. Such proceedings were to be commenced expeditiously before a single judge in the Commercial Court and any appeal therefrom was to be similarly expedited. The Court of Appeal would grant leave to appeal to the House of Lords thus enabling the garnishee proceedings to be determined by the House of Lords at the same time as the appeal on the injunction. Enforcement of any garnishee order absolute which might be granted would be stayed pending determination in the House of Lords of any appeal in respect thereof.

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P. M.