Case No: 1999 Folio 1281

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 April 2000

B e f o r e :

THE HON. MR JUSTICE THOMAS

- -

(1) VALE DO RIO DOCE NAVEGACAO S.A. **Claimants**
(2) SEAMAR SHIPPING CORP
- v -
(1) SHANGHAI BAO STEEL OCEAN SHIPPING CO LTD **Defendants**
(TRADING AS BAOSTEEL OCEAN SHIPPING CO.)
(2) SEA PARTNERS A.S.

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Mr Duncan Matthews (instructed by Messrs Holman Fenwick & Willan for the Claimants)
Mr Christopher Butcher (instructed by Messrs Sinclair Roche & Temperley for the second Defendants) The first defendants did not attend and were not represented.

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I certify that the attached text records my judgment and direct that no further note or transcript need be made

Mr Justice Thomas:

Introduction

1. There is before the court an application to set aside an arbitration claim form which has been issued by the Claimants (the Owners). In the arbitration claim, the Owners make an arbitration application for a declaration that the first Defendants (Bao Steel) were parties to a contract of affreightment made on 3 September 1997 between Bao Steel and the Owners. Bao Steel had, prior to the issue of the arbitration claim form, disputed that they were parties to the contract on the basis that the second Defendants (the Brokers) who are said to have concluded that contract on their behalf had no authority to do so. In the application before the court, the Brokers seek to set aside the arbitration claim form as against them on the grounds that this court has no jurisdiction over them in respect of the subject matter of the claim in the arbitration claim form.

Background

2. The Owners are both companies within the same group; the first Claimant is Brazilian and the second Claimant is Liberian. In 1997 through their Belgian office they entered into negotiations with the Brokers, a company domiciled in Norway, for a contract of affreightment for shipments of iron ore from Brazil to China.

3. On 3 September 1997 the Brokers sent to the Owners a telex in which the Brokers stated that a company called Baosteel Ocean Shipping Co. had agreed to the terms of the contract of affreightment which they then set out in summary. One of those terms was that the seat of arbitration was to be London with English law to apply. They subsequently sent to the Owners a full copy of the full contract of affreightment. Clause 27 of that document stated:

> "Any disputes arising under the contract shall be settled amicably. In case no such settlement can be reached, the matter in dispute shall be referred to three persons at London and according to English law. One chosen by each of the parties hereto and the third by the two so chosen; their decision or that of two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the court, the arbitrators shall be commercial men."

The contract of affreightment was never signed.

4. In November 1997 the Owners performed a voyage which they claim was made under the contract of affreightment for a company called Bao Hercules Inc. and in May 1998 a second voyage was performed for a company called Eastern

Rich Operations Inc. It is the Owners' case that each of these companies performed the contract as agents for Bao Steel.

5. No further voyages were performed. Subsequently Bao Steel asserted that they had never authorised the Brokers to conclude the contract of affreightment and therefore deny that they are parties to the contract of affreightment.

6. The Owners decided that instead of commencing an arbitration against Bao Steel by appointing their arbitrator, the better course for them would be to obtain a declaration from this court that Bao Steel were a party to the arbitration agreement; if they were successful in obtaining that declaration, they would then proceed with the arbitration. They also decided that they would join the Brokers into that application to the court, even though the Brokers maintained they had authority to conclude the contract of affreightment, on the basis that there would inevitably be an enquiry as to whether the Brokers had authority to negotiate and conclude the contract of affreightment on behalf of Bao Steel; they wanted to ensure that the Brokers explained how they had obtained that authority and that any finding as to the validity or otherwise of the arbitration agreement was binding on the Brokers. However, as I explain below, they accept that, if the Brokers can be sued for this purpose, the court would have no jurisdiction, in the event that the court concluded that the Brokers had not had authority to make the contract on behalf of Bao Steel, to consider a claim for damages. Such a claim would have to be brought in Norway.

7. On 7 October 1999 David Steel J gave permission to the Owners to serve the arbitration claim form on Bao Steel in China and on the Brokers in Norway. The Brokers appointed solicitors in London who have issued this application to set aside the arbitration claim form; the arbitration claim form had not at the time of the hearing been served on Bao Steel, though attempts were being made to do so.

8. The Brokers advanced five separate grounds upon which they contended the arbitration claim form should be set aside:

(1) The claim was not within the arbitration exception in the Lugano Convention and therefore there was no jurisdiction to seek a declaration as against them in this court.

(2) CPR PD49G (Practice Direction - Arbitrations) did not in any event permit service of the arbitration claim form on them in Norway.

(3) The Arbitration Act 1996 did not permit the Owners to make an application for a declaration against Bao Steel that there was an arbitration agreement.

(4) The Court had no jurisdiction to grant declaratory relief against the Brokers.

(5) The Court should in any event exercise its discretion against exercising jurisdiction over the Brokers.

It is convenient to consider each of these grounds in turn.

Issue 1: Is the claim within the arbitration exception in the Lugano Convention?

9. Article 1 of the Lugano Convention provides:

> The Convention shall not apply to:
> ...4. Arbitration

10. It is common ground for the purposes of this application that, unless the Owners can bring the application before the court within the arbitration exception in Article 1 which I have set out, then in accordance with Article 2 they must bring any claim in the courts

of Norway where the Brokers are domiciled. It is also common ground that if the Owners want to bring a substantive claim for damages against the Brokers, in the event that it is found that they had no authority to make the contract of affreightment on behalf of Bao Steel, then that claim would have to be made in Norway; furthermore it would be determined by principles that might be different from the law of England and Wales.

11. In *Marc Rich and Co. AG v. Societa Italiana Impianti (The Atlantic Emperor)* [1991] 1 ECR 3855, [1992] 1 Lloyd's Rep 342 the European Court of Justice set out

its view on the purpose of the exception of arbitration from the scope of the Convention at page 3900:

> "17. With respect to the exclusion of arbitration from the scope of the Convention, the report by the group of experts set up in connection with the drafting of the Convention (Official Journal 1979 C 59, p. 1) explains that
>
> > "There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration".
>
> 18. The international agreements, and in particular the above mentioned New York Convention on the recognition and enforcement of foreign arbitral awards (New York, 10 June 1958, United Nations Treaty Series, Vol. 330, p. 3), lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts."

12. It is apparent from this passage in the judgment that in determining what is excluded by the arbitration exception reference must be made to international conventions on arbitration and in particular to the New York Convention. It is clear from the terms of that Convention that it is dealing with arbitration between parties to an arbitration agreement (see in particular Article II); it does not deal with anything more than that. Thus although there may be room for dispute as to whether particular proceedings between the parties to an arbitration agreement are within the term "arbitration" as used in the Lugano Convention, it seems to me clear that the term arbitration cannot refer to anything other than the arbitration itself and proceedings brought before national courts between the parties to the arbitration or arbitration agreement in relation to that arbitration. There is, in my view, no warrant for reading the words in any wider sense and being applicable to proceedings against persons not parties to the arbitration agreement; none of the cases in which the decision of the European Court of Justice has been applied (see for example *Toepfer v Societe Cargill France* [1997] 2 Lloyd's Rep 98, *Toepfer v Molino Boschi* [1996] 1 Lloyd's Rep 510) has suggested a wider application.

13. In *Lexmar Corporation and Steamship Mutual Underwriting Association v. Nordisk* [1997] 1 Lloyd's Rep 289, Colman J held that proceedings to enforce an

undertaking given by a third party securing an order for security for costs made in the arbitration were not within the exception. I agree with the view he expressed that judicial proceedings which are directed to the regulation and support of arbitration proceedings and awards are covered by the exception. He continued at p292:

> "Does it follow that proceedings to enforce a letter of undertaking given by a third party pursuant to an order for security for costs made in an arbitration involving the beneficiary of the security and the party required to provide it are also covered by the exception? To this the answer must clearly be No. Such proceedings have nothing whatever to do with the exercise of the English Courts of their curial law jurisdiction to regulate or support arbitration or their jurisdiction to enforce awards. The proceedings are simply to enforce the debt of a third party which has accrued due and become payable upon the happening of events which were constituents of or related to the arbitration proceedings between two other parties. The issue whether that debt is due and payable will not be resolved by the English Courts in the course of the exercise of any jurisdiction relating to the regulation of or support for arbitrations, but as part of their ordinary jurisdiction to determine whether debts are recoverable under contracts governed by English law."

14. I agree with this view. There is nothing in that judgment which suggests that the arbitration exception is wide enough to extend to proceedings, such as the present, involving persons who are not parties to the arbitration.

15. The Owners relied upon two particular authorities. First they referred to paragraph 64 of Schlosser Report (O.J. 1979 C.59, p71 at pp92-93):

> "The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as "statement of a special case" (S. 21 of the Arbitration Act 1950). 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 European Court of Justice in *Van Uden Maritime BB v K.G. Deco-Line* [1999] 2 WLR 1181 at 1209 (para 31 and 32) referred to this passage in the Schlosser Report as part of its judgment.

16. In the second place they relied upon the decision in *Union Remorquage et de Sauvetage SA v Lake Avery (The Lake Avery)* [1997] 1 Lloyd's Rep 540. In that case the plaintiffs claimed a declaration that there was a valid and binding agreement (which included a provision for the appointment of an arbitrator in London) with the defendants who sought to rely upon Articles 21 and 22 of the Convention. The

plaintiffs contended their claim was within the arbitration exception. In rejecting the distinction which the defendants sought to draw between the circumstances in that case and *The Atlantic Emperor*, Clarke J said at p 548:

> "I do not think that the European Court can have intended that all should depend upon the form of the application to the Court or the relief sought. As it seems to me, the correct test is whether the relief sought in the action can fairly be said to be ancillary to, or perhaps, an integral part of the arbitration process. In the instant case [counsel for the plaintiffs] seeks leave (if necessary) to amend the writ so as to claim a declaration that [the arbitrator] was validly appointed as arbitrator under LOF. In my judgment if the relief sought had been so formulated in the first place there would have been no distinction at all between this case and *The Atlantic Emperor*."

17. I agree with Clarke J that the form of the application does not matter. The Owners adopted Clarke J's higher formulation (which they contended was sufficient for their purposes) that the test is whether the relief sought could fairly be said to be an integral part of the arbitration process. Proceeding on that formulation, I ask the question whether the application as against the Brokers can be said to be an integral part of the arbitration process. The answer to that question is plainly no. If, for example, the question of whether the arbitrators had jurisdiction was to be determined before the arbitrators (as I consider in greater detail at issue 3), the Brokers would not be party to that determination, though they might give evidence at such a hearing. Furthermore the determination in court proceedings of whether there was an agreement between the Owners and Bao Steel (as contemplated in the Schlosser Report) again can be made without the presence of the Brokers as a party. I therefore do not see how any assistance can be derived by the Owners from the Schlosser Report or the decision in *The Lake Avery*. In the circumstances, it is not necessary for me to consider the view expressed by Mance J in *Toepfer v Molino Boschi* (at page 513) that a claim would not fall within the arbitration exception where what was sought was a declaration against the other party to the alleged arbitration agreement that there was an arbitration agreement in circumstances where the claim was designed to do no more than to establish the basis for a claim for damages for breach of contract in failing to arbitrate or for an issue estoppel in foreign proceedings. If a claim in such circumstances is not within the exception, then this claim against the Brokers clearly cannot be.

18. To accede to the application made by the Owners in this case would have far reaching implications. It is not uncommon in commercial litigation to find that the authority of an intermediary to conclude a contract containing an arbitration clause is

questioned. Thus extension of the scope of the arbitration exception in the Convention in the manner suggested by the Owners might well arise in a not infrequent number of cases. It would, for the reasons I have given, be contrary to fundamental principle and extend the decisions so far made on the arbitration exception well beyond anything the courts have hitherto contemplated.

19. It therefore follows from my conclusion on the scope of the arbitration exception in the Convention that the High Court of England and Wales has no jurisdiction over the Brokers to determine the issue raised. If the Owners had been successful on this issue, they would then have had to meet the Brokers' argument that there was no jurisdiction under the Civil Procedure Rules to permit service of the arbitration claim form against them in Norway, whether or not the claim was outside the arbitration exception of the Lugano Convention. It is therefore convenient to consider this issue next.

Issue 2: Is there jurisdiction under CPR PD49G (Practice Direction-Arbitrations) to permit service of the arbitration claim form against the Broker out of the jurisdiction?

The provisions of CPR PD49G (Practice Direction-Arbitrations)

20. Permission to serve the arbitration claim form on the Brokers in Norway was given under the provisions of the Practice Direction-Arbitrations (CPR PD49G). This Practice Direction replaced, with modifications, RSC Ord 73.

21. Part I of CPR PD49G (which is the part applicable to arbitrations under the Arbitration Act 1996) provides that it is founded on the general principles in s. 1 of the Arbitration Act 1996 and is to be construed accordingly. It defines in paragraph 2.1 the meaning of the term 'arbitration application' as follows:

> (1) an application to the court under the Arbitration Act;
> (2) proceedings to determine -
> (a) whether there is a valid arbitration agreement;
> (b) whether an arbitration tribunal is properly constituted;
> (c) what matters have been submitted to arbitration in accordance with an arbitration agreement;
> (3) proceedings to declare that an award made by an arbitral tribunal is not binding on a party;
> (4) any other application affecting arbitration proceedings (whether instituted or anticipated) or to construe or affecting an arbitration agreement.

22. An arbitration application must be made in an arbitration claim form; the power to serve the arbitration claim form out of the jurisdiction is set out in paragraph 8.1 of CPR PD49G:

> 8.1 The Court may give permission to serve an arbitration claim form out of the jurisdiction if the arbitration application falls into one of the categories mentioned in the following table and satisfies the conditions specified.
>
> | **Nature of application** | **Conditions to be satisfied** |
> |---|---|
> | 1 ... | |
> | 2 ... | |
> | 3 The applicant seeks some other remedy or requires a question to be determined by the court, affecting an arbitration (whether pending or anticipated), an arbitration agreement or an arbitration award. | The seat of the arbitration is or will be in England & Wales or the conditions in S. 2(4) of the Arbitration Act are satisfied. |

23. On the assumption that the claim is within the arbitration exception of the Lugano Convention, the issue for determination is whether the Owners are in the claim against the Brokers requiring a question to be determined by the court affecting an arbitration or an arbitration agreement within the meaning of the third paragraph in the table to paragraph 8.1 of CPR PD49G. The primary approach to this question of the construction of CPR PD49G should be to consider its language and, as the Practice Direction directs, to construe it on the basis of the general principles set out in s. 1 of the Arbitration Act 1996; both the Act and the Practice Direction are in readily understandable terms and should generally be construed on their language: see *Patel v Patel* [1999] 1 ALL E.R (Comm) 923. It should generally be unnecessary to consider the cases under the old law for reasons I endeavoured to summarise in *Seabridge Shipping AB v Orssleff's Eftf's* [2000] 1 ALL R (Comm) 415 at 422. However, although the question should be determined on the readily understandable language of the CPR, there are reasons in this case to have regard to cases decided under the Arbitrations Acts 1950-79 primarily because the underlying rationale in those cases remains applicable; furthermore, as I shall explain, the origin of this particular Practice Direction may assist in the determination of its scope.

The origins of CPR PD49G and the decisions under RSC Ord 73

24. The relevant paragraphs of part I of CPR PD49G are in all material respects identical to those in RSC Ord 73 as amended on the 19 December 1996; those

amendments came into force on 31 January 1997 at the same time as the Arbitration Act 1996 and were necessary to give effect to the terms of the Act.

25. The provisions relating to arbitrations to which the Arbitration Acts 1950-79 applied were retained in part II of the amended RSC Ord 73; that part now forms part II of CPR PD49G. Rule 29 of that part of the amended RSC Ord 73 set out the provisions relating to service out of the jurisdiction. Those provisions reflected the unamended RSC Ord 73 in force prior to 31 January 1997. It was under those earlier provisions that the courts had had to consider whether they had jurisdiction to permit service out of the jurisdiction of proceedings in relation to an arbitration on a person who was not party to that arbitration.

26. The principal decision was that of Clarke J in *Unicargo v Flotec Maritime (The Cienvik)* [1996] 2 Lloyd's Rep 395. The plaintiffs in that case had sub-chartered the vessel from the first defendants under a charterparty which contained a London arbitration clause; the first defendants had chartered the vessel from the second defendants who were the owners of the vessel. The plaintiffs sought an order under S. 12(6)(g) of the Arbitration Act 1950 that both defendants permit a surveyor to inspect the engine and other parts of the vessel. They claimed the court had jurisdiction to make the order against both Defendants under RSC Ord 73 r.7, the terms of which were as follows:

> (1) Subject to paragraph (1A), service out of the jurisdiction of -
> (a) any originating summons or notice of originating motion under the Arbitration Act 1950 or the Arbitration Act 1979, or
> (b) any order made on such a summons or motion as aforesaid,
> is permissible with the leave of the Court provided that the arbitration to which the summons, motion or order relates is governed by English law or has been, is being, or is to be held within the jurisdiction ...

27. The second defendants contended that the court had no power to make the order because RSC Ord 73 r. 7 was concerned only with applications to the court by the parties to the arbitration. In acceding to that submission, Clarke J (after referring to a passage in the judgment of Bingham LJ in the *John C Helmsing* [1990] 2 Lloyd's Rep 290 dealing with the relationship between RSC Ord 11 and RSC Ord 73) said:

> "I accept [counsel for the second defendants'] submission that the rationale of O.73, r.7 is that the parties to an arbitration agreement have consented to the determination of their disputes by arbitration in England. It makes sense for the rules to permit service out of the jurisdiction of applications by one party against the other relating to the arbitration between them. There is, however, no similar rational basis for saying

> that the English Court should have power to allow service out of the jurisdiction of proceedings relating to an arbitration to which the proposed defendant is not a party.
>
> It follows, in my judgment, that when O.73, r.7 is viewed in its context and having regard to its purpose, it is properly to be regarded as being concerned only with applications by and against parties to an arbitration which relate to the arbitration to which they are parties. Thus, the natural meaning of the rule is that the application must be against the other party to the reference.
>
> RSC, O.11 contains in r.1(1)(c) an express provision which deals with the position of necessary or proper parties. In my judgment, if the draftsman of O.73, r.7 had intended to give the Court jurisdiction to give leave to serve an application on non-parties out of the jurisdiction, he would have done so expressly."

28. In *Tate & Lyle Industries Ltd v Cia Usina Bulhoes and Cargill Inc* [1997] 1 Lloyd's Rep 355 Hobhouse LJ considered in August 1996 (as a single Judge of the Court of Appeal) an appeal from a refusal by Clarke J to grant an injunction sought against the first defendants (who were parties to an arbitration agreement with the plaintiffs) and the second defendants (Cargill) who were not. He referred to Clarke J's judgment in *Unicargo v Flotec*.

> "I find his reasoning in that judgment persuasive and nothing that I will say hereafter should be thought to detract from that view. However, Mr Justice Clarke, when acting on that judgment and refusing to continue the injunction in these present proceedings and to discharge it as against Cargill on the grounds of want of jurisdiction, gave leave to appeal. Mr Justice Clarke, therefore, accepted that there were arguable points capable and suitable for consideration by the Court of Appeal that arose out of his decision in *Unicargo v. Flotec* and his application of it to the present case."

29. Rule 29 of the amended RSC order 73 reproduced the terms of r. 7 in identical terms to the provisions considered by Clarke J and Hobhouse LJ. Paragraph 29 in Part II of CPR PD49G is again in materially identical terms, save with the amendments to deal with the CPR procedure for making applications.

30. It is against that background that I turn to consider the question before me.

The scope of CPR PD49G in relation to persons who are not parties to the arbitration

31. The Owners submitted that I should construe CPR PD49G without reference to the previous decisions which I have summarised. When the provisions of CPR PD49G were read naturally, they plainly permitted an arbitration application to be served out of the jurisdiction on a person who was not party to the arbitration. If regard was to be had to the previous procedural law, then an application similar to this could have been made under RSC Ord 11; first proceedings would have begun against Bao Steel and leave to serve out of the jurisdiction obtained on the basis that

the contract was governed by English law and after service on them, the Brokers could have been joined as necessary and proper parties to that claim. As such a claim should now be brought as an arbitration application, there was no reason to read the new provisions as taking away a remedy that would have been available under the previous procedural law.

32. I will first consider the terms of CPR PD49G on its ordinary language and construe it in accordance with the general principles set out in the Arbitration Act 1996. The third paragraph of the table in paragraph 8.1 (with which this application is concerned) provides for service out of the jurisdiction of an arbitration application where the applicant is seeking some remedy or requiring a question to be determined by the court affecting an arbitration agreement or an arbitration award. The essence of an arbitration agreement is that it is a consensual agreement between the parties to it; the only parties to the arbitration pursuant to the arbitration agreement are the parties to the arbitration agreement. For example, where it is alleged that a misrepresentation or non disclosure has been made by an agent or where, as here, the authority of the agent is called into question, the agent is not a party to the arbitration, unless he agrees to be a party and the arbitration agreement amended to provide for this. In that context, the third paragraph of the table to paragraph 8.1 must be read as being referable solely to an application that is to be made only as between the parties to the arbitration agreement (or persons alleged to be parties) or the arbitration pursuant to that agreement.

33. The rationale for that construction of the Practice Direction is entirely consistent with the reasoning of Clarke J in *The Cienvik* (with which I entirely agree) under the previous procedural law. It seems to me clear that the principles applicable to the approach to the former Ord 73 and CPR PD49G are the same, as the principles are premised on the nature of an arbitration.

34. Although I have reached that view on the clear language of CPR PD49G, it is, in my view, also permissible to have regard to the fact that the decisions to which I have referred and in particular that of Clarke J in *The Cienvik* must have been in the minds of the draftsmen of the amendments to RSC Ord 73 (which came into force in 1997) and which are to be found in CPR PD49G. Clarke J expressly pointed out that it might be desirable for consideration to be given to adding a provision to the procedural rules enabling necessary and proper parties to be joined. However, the

draftsmen of the amendments to RSC Ord 73 and the Practice Direction took no such step. There would, on reflection, have been good reason (arising from the nature of arbitration) for declining to add such a provision to the procedural rules. The choice of London (or another seat within England and Wales) is the principal basis by which the court derives its jurisdiction under this paragraph of the table. It must have been thought that there might be far reaching consequences in allowing the courts to exercise jurisdiction over others merely because the parties had chosen an extra judicial means of resolving their dispute through arbitration in London, quite apart from the consideration, at least as regards this part of the table in paragraph 8.1, that it would be contrary to the principles to which I have referred.

35. There is further support for the conclusion which I have reached from the wording chosen in the third paragraph of the table in paragraph 8.1. The draftsman referred to a remedy or question "affecting ... an arbitration agreement". The word "affect" was a word used in Ord 11 r 1(1)(d); this remains in force as a paragraph in R11.1 of schedule 1 to the CPR. *In Finnish Marine Insurance Co. v. Protective National Insurance Co.* [1990] QB 1078 Adrian Hamilton QC (sitting as a Judge of this Court) considered whether reinsurers could claim against their reinsured who were outside the jurisdiction a declaration that they were not bound by the reinsurance which had been made by their agents. The reinsurers contended that there was jurisdiction under Ord 11 r 1(1)(d) which provided that there was jurisdiction where the claim was brought to "enforce, rescind, dissolve, annul or otherwise affect a contract" made through an agent within the jurisdiction; among their submissions, was the argument that the contract did not have to be between the plaintiffs and the defendants; it was sufficient for the reinsurers to show that the claim affected their contract with their agent. Adrian Hamilton QC said:

> "If [counsel for the reinsurers] is right this is a point which has been regularly overlooked by distinguished lawyers. In my judgment, however, it is clearly wrong. It is probably sufficient to construe the rule alone. It seems to me clear that all the earlier grounds ("enforce, rescind, dissolve, annul") can only relate to a contract between plaintiff and defendant. There is nothing to indicate that a different type of contract becomes available when the claim is to "affect" a contract. In each case "contract" means a contract between plaintiff and defendant."

36. This decision has been followed in a number of other cases; see for example *Amoco (UK) Explorations Co Ltd v. British American Offshore Ltd.* [1999] 2 Lloyd's Rep 772 and the authorities set out in the judgment of Langley J at page 779.

37. It was therefore rightly submitted on behalf of the Brokers that when the draftsman used the word "affect" in this paragraph of the table to paragraph 8.1 of CPR PD49G and the amendments to RSC Ord 73 and not the word "relates" used in the original Ord 73 and in paragraph 29(1) of the CPR PD49G (in part II applicable to arbitrations under the Arbitration Acts 1950-79), the draftsman was seeking to use a word bearing a narrower scope than "relates". It seems to me that the choice of that word must indicate, in the context of a provision about service out of the jurisdiction a desire to make it clear, if it were otherwise not so, that the application was to be an application between the parties to the arbitration agreement.

38. There are two other arguments advanced by the Owners to which there is also a clear answer. First they contended that, prior to the amendments made to RSC Ord 73 which came into effect in January 1997 and which are contained in CPR PD49G, a claim in these circumstances could have been brought under Ord 11. However, as the Brokers are a company domiciled in Norway, the right to serve on them is governed by the provisions of the Lugano Convention. For reasons that I have given in considering issue 1, the provisions of the Lugano Convention would in any event have barred service out under Ord 11.

39. The Owners' second argument was that the provisions of the second paragraph of the table under paragraph 8.1 of CPR PD49G did permit service out of the jurisdiction on persons other than parties to the arbitration and the third paragraph of the table ought to be read in the same way. The second paragraph permits applications for service of orders under s. 44 of the Arbitration Act 1996 which confers on the court powers exercisable in support of arbitral proceedings; these include powers for the taking of evidence of witnesses, the preservation of evidence and the making of orders in relation to property (such as inspection or sampling); it is the equivalent provision to s. 12 of the 1950 Act which Clarke J considered in *Unicargo v Flotec Maritime* (*The Cienvik).* The Owners relied, in support of their argument, on a passage in Professor Merkin's Arbitration Law at paragraph 1.32:

> "Two important changes to the law are made. First, although the point is not specifically dealt with, it is implicit in para 8 of CPR Practice Direction 49G that an order may be made against a witness and not simply a party to the proceedings, reversing the effect of authorities under the previous version of the rule."

The second change is not material.

40. It was common ground that Professor Merkin, by his reference to an order being made against a witness, must have been contemplating an order of the kind sought in *The Cienvik* as that is the case to which he cross refers (see paragraph 1.31). Professor Merkin, however, cites no reason for his contention and I see nothing in the language of the Practice Direction that indicates a change from the previous law. I prefer the view expressed in the 13th edition of *Dicey and Morris on the Conflict of Laws* (2000) where in a footnote to paragraph 16 - 028 on page 604 the editors comment that paragraph 8.1 of CPR PD49G applies only to applications by and against parties to an arbitration and that it does not allow service out of the jurisdiction on a non party. It seems to me very clear words would have been needed to give the Courts of England and Wales authority to order, for example, an inspection of property controlled by a third person out of the jurisdiction merely because the parties to an arbitration had chosen England and Wales as the seat of their arbitration. But, even if Professor Merkin were right about the provisions of paragraph 2 of the table in paragraph 8.1, that would not in my view mean that paragraph 3 of the table in paragraph 8.1 would have a similar effect; different considerations may apply to the different paragraphs.

41. Finally, even if I had thought that the wording of paragraph 8.1 might have left the matter open, I would have had to bear in mind that any doubt would have had to have been resolved in favour of the person resident outside the jurisdiction; the approach to paragraph 8.1, as to Ord 11, must be the same and it therefore follows that clear words would be necessary to confer jurisdiction.

42. I therefore conclude that, even if the claim against the Brokers was within the arbitration exception of the Lugano Convention, the court has no jurisdiction under the provisions of CPR PD49G to permit service of the claim on the Brokers in Norway. As there are therefore two clear reasons why the service of the arbitration claim form must be set aside as against the Brokers, I will consider the remaining grounds more briefly for the reasons I give below.

Issue 3: Do the terms of the Arbitration Act permit the Owners to make the application?

43. The next ground on which the Brokers relied was their contention that the terms of the Arbitration Act 1996 did not permit the Owners to seek the determination against Bao Steel by the court of the question of whether there was a binding

agreement; there was therefore no basis to seek a declaration against either Bao Steel or the Brokers, irrespective of the fact that Bao Steel and the Brokers were domiciled and resident outside England and Wales. This was a contention which would ordinarily be that of Bao Steel (if they sought to advance it) and, as they were in the process of being served at the time of the hearing, they did not have the opportunity of stating whether this was an argument they intended to make or of commenting on the argument made by the Brokers. With that reservation, I will set out my view on the argument advanced.

44. S.30 of the Arbitration Act 1996 provides that the tribunal may rule on its own substantive jurisdiction. It is clear from the Report of the Departmental Advisory Committee on the Arbitration Bill (DAC Report) that s.30 was intended to state the doctrine of *"kompetenz-kompetenz".* It was the intention that the basic rule was to be that the tribunal would make the rulings on jurisdiction in the first instance rather than recourse being had to the courts.

45. S.32 provides an exception to this basic rule; under s.32(1) the court may determine questions as to the substantive jurisdiction of the tribunal on the application of a party to arbitral proceedings. A restriction on that right is imposed by s.32(2);

> An application under this section shall not be considered unless-
> (a) it is made with the agreement in writing of all the other parties to the proceedings, or
> (b) it is made with the permission of the tribunal and the court is satisfied-
> (i) that the determination of the question is likely to produce substantial savings in costs,
> (ii) that the application was made without delay, and
> (iii) that there is good reason why the matter should be decided by the court.

S.32 was therefore intended to provide that an application to the court would only be made in strictly limited circumstances; recourse to the court would be very much the exception. Paragraph 147 of the DAC Report states:

> "This Clause provides for exceptional cases only: it is not intended to detract from the basic rule as set out in Clause 30. Hence the restrictions in Clause 32(2), and the procedure in Clause 32(3). It will be noted that we have required either the agreement of the parties, or that the Court is satisfied that this is, in effect, the proper course to take. It is anticipated that the Courts will take care to prevent this exceptional provision from becoming the normal route for challenging jurisdiction."

46. In *ABB Lumnus Global Ltd v Keppel Fells Ltd* [1999] 2 Lloyd's Rep 24, Clarke J declined to consider an arbitration application for a declaration that an arbitration application was still on foot because the requirements of s.32(2) were not satisfied. He observed that the purpose of the Act was to restrict the role of the court at an early stage of the arbitration.

47. The issue raised by the application to the court in the arbitration claim form in these proceedings is clearly a question as to the substantive jurisdiction of the arbitrators within the meaning of s.30 (see the definition in s 82(1)). If the Owners had appointed an arbitrator, it is also clear, as was accepted by the Owners, that the court would not have had jurisdiction to determine the issue, as the conditions in s.32(2) were not satisfied. The Owners, however, contended that the conditions contained in s.32(2) were not applicable to these proceedings because, they have not appointed an arbitrator, and they are not a party to arbitral proceedings. They are therefore entitled to bring the arbitration application.

48. I do not accept the submission. The court is given guidance as to the circumstance in which it should intervene in relation to arbitration by the terms of s.1 in part I of the Act . This provides:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly:
>
> ...
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

49. It is clear from the DAC Report that this principle was included because of international criticism that the courts of England and Wales intervened more than it was thought they should in the arbitral process, and this was a discouragement to the selection of London as a forum for arbitration.

50. The provisions of Part I of the Act regulate all matters not only after constitution of the tribunal by the appointment of an arbitrator but prior to that; see for example s.9, s.12 and s.44(5) which all relate to powers that can be exercised prior to the appointment of the arbitral tribunal.

51. In my view therefore the present application for the determination of whether there is an arbitral agreement is a matter regulated by Part I of the Act and in

accordance with s.1(c), the court must approach the application on the basis it should not intervene except in the circumstances specified in that part of the Act.

52. I accept the Owners' submission that the use of the word "should" as opposed to the word "shall" shows that an absolute prohibition on intervention by the court in circumstances other than those specified in Part I was not intended. That submission seems to me to have force as the view is expressed in the DAC Report that a mandatory prohibition of intervention in terms similar to Article 5 of the Model Law was inapposite. However it is clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Part 1 of the Act.

53. The circumstances in this case which the Owners say are ones in which the court should intervene cannot have been unanticipated by the draftsmen of the Act. It is very common for a person who is alleged to be party to an arbitration agreement but denies that he is, to make his position clear before an arbitrator is appointed by the person contending that there is a binding arbitration agreement. Thus the argument of the Owners must be premised on the assumption that the draftsmen of the Act intended to allow a party to an arbitration agreement recourse to the courts without any conditions, if he took that step prior to the appointment of an arbitrator, but imposed the conditions in s.32 if he had appointed an arbitrator. If the Owners are right, then a party to an arbitration agreement which is disputed can obtain the decision of the courts without being subject to the restrictions by the simple step of not appointing an arbitrator.

54. I do not consider that this can have been the intention. The Act sets out in very clear terms the steps that a party who contends that there is another party to an arbitration agreement should take. First he should appoint an arbitrator. If the other party appoints an arbitrator, then s. 31(1) makes it clear that his appointment of an arbitrator does not prevent him challenging the substantive jurisdiction of the tribunal. If the other party does not appoint an arbitrator, then the default provisions (s.17) or failure of appointment procedures (s.18) apply. Once the arbitral tribunal is constituted, then in accordance with the policy of the Act it is for that tribunal to rule on its own jurisdiction, save in the circumstances specified in s 32. Any award made can then be challenged under s.67. The rights of the party who challenges the

existence of the arbitration agreement and takes no part are protected by s.72; he is given the right of recourse to the courts in the circumstances set out. Those provisions, in my view, provide a clear and workable set of rules which the Owners should have followed in this case. I can see no reason which would justify the court intervening in the circumstances of this particular case, as it is no different from many others.

55. The Owners contended that it would be in the overall interest of justice for the court to hear this application because it would generally be convenient to do so and that the argument over the validity of the arbitration agreement was bound to arise at a later stage. However this argument fails to take into account one of the underlying principles of the Act that the parties should resolve their dispute by the methods they have chosen and the court's intervention should be limited.

56. It was also argued by the Owners that the dispute would in any event arise before the court if recourse was had by them to s.18; at that stage, there would be a hearing to determine whether there was in fact an agreement or not. The position of Bao Steel is not known and it may be that they would appoint an arbitrator. That is a sufficient answer to the point. However, the Brokers contended, that even if they did not and an application was made under s.18, it was not necessarily the case that the court would have to determine finally the question of whether there was an arbitration agreement on the application under s 18; their argument can be summarised in this way:

(1) It is clear from s.31(1), as I have mentioned, that a party is not precluded from raising an objection to the substantive jurisdiction of the tribunal by reason of the fact that he has appointed or participated in the appointment of an arbitrator. S.18(4) provides:

> "An appointment made by the court under this section has effect as if made with the agreement of the parties."

(2) The court on an appointment need not therefore finally determine the issue as to whether or not there was an arbitration agreement as it is doing no more than the party in default should have done. The effect of the court's appointment of an arbitrator should be no different.

(3) There was support for this view in the opinion of the Advocate General in *The Atlantic Emperor* at paragraph 27 (page 3874 of the report) that a decision by the Court on the appointment of an arbitrator was not one where a final conclusion would be made upon whether there was a binding arbitration agreement.

57. This issue does not directly arise in the present application as I am not concerned with an application under s.18. It is preferable for this issue to be resolved in the context of an application under s.18, as in the context of an actual application the conflicting considerations are more easily refined. However I do see the force of the argument advanced by the Brokers and in the opinion of the Advocate General that, in accordance with the policy of the Act, a court on an application for an appointment under s.18 might not wish to get embroiled in a trial of the question of whether there was an arbitration agreement, but merely enquire whether there was sufficient on the material before it to enable it to appoint an arbitrator and then leave the arbitration tribunal constituted after the exercise of the court's powers to make the determination in accordance with s.30 or allow recourse to the courts under s.32.

58. In the circumstances of this particular case, it is not necessary to determine whether there would arise a dispute as to the existence or not of the arbitral agreement which the court would have to resolve finally at the time of the s 18 application, but the fact that the court might have to do it at that stage is not an argument for saying it should do it at some earlier stage not envisaged by the draftsmen of the Act. Moreover, if the hearing of the s.18 application was the time at which the court had to determine the issue as to whether or not there was a binding agreement, the Brokers would plainly not be party to that determination; that would be a determination between the Owners and Bao Steel.

59. The Owners also argued that the terms of paragraph 2.1 of CPR PD49G (set out at paragraph 21 of this judgment) supported their contention. That paragraph defines the term "arbitration application" as including not only an application to the court under the Arbitration Act but proceedings to determine whether there is a valid arbitration agreement. They therefore submitted that the fact that the Practice Direction contemplated proceedings to determine whether there was a valid arbitration agreement as a separate category from an application to the court under the Arbitration Act showed that it was contemplated by the draftsman of these

provisioins there would be applications such as the present which did not lie under the terms of the Act. I cannot accept that argument. The short answer to it is that the definition of an "arbitration application" was intended to be all embracing and no doubt the draftsman, out of an abundance of caution, included sub paragraph 2 of paragraph 2.1 to spell out the terms of the Act (or just possibly to cater for an oral arbitration agreement). It cannot possibly affect the construction of the Act.

60. Thus, subject to the reservation I have made, I conclude that for this still further reason the court has no jurisdiction to allow this arbitration application against the Brokers.

Issue 4: Is this a case where the court would have jurisdiction to grant a declaration against the Brokers?

61. The Brokers contended that, even if the court had jurisdiction over them (contrary to my views on the first three issues) it has no jurisdiction to grant a declaration as between the Owners and the Brokers as there were no contested rights between them which were enforceable by the Owners against them.

62. The guiding principle in this context is set out in the speech of Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] A.C. 435 at 501:

> "The only kinds of right with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the Court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.
>
> The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous to a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

63. The authorities relating to the jurisdiction of the court to grant declarations was further reviewed by the Court of Appeal in *Meadows Indemnity Co Ltd v Insurance Company of Ireland* [1989] 2 Lloyd's Rep 298 where the plaintiff reinsurers sought various declarations including a declaration as against the insured (the second defendants) in respect of the insurance contract between the insured and their insurers (the first defendants). The Court held that, although the reinsurers had a direct interest in the validity of the insured's claim against his insurers (whom they reinsured), there was no contested issue between the insured and the reinsurers (see the judgement of Neil LJ at p.305 and the judgement of May LJ at p.309). In that case it was clear that reinsurers and the insured had no rights against or obligations to each other and were not in any contractual relationship.

64. However in this particular case, the declaration sought by the Owners is a declaration as against both Bao Steel and the Brokers as to whether or not there was a binding agreement. The Owners say that as the Brokers purported to make the contract on behalf of Bao Steel, and, as Bao Steel deny the Brokers had authority to do so, they are entitled to declarations as to their legal rights against the parties with or through whom those legal rights are alleged to have come into existence, but the existence of which is challenged. They make the point that the Brokers cannot maintain that there is no dispute as between them as the Brokers have declined to be bound by the outcome of their claim against Bao Steel.

65. In circumstances which were not complicated by the existence of an arbitration agreement and the Lugano Convention, the question as to whether a declaration was appropriate would probably not arise. The Court would determine whether there was a contract and the responsibility of the intermediary in the event it concluded there was no binding contract; the decision against the intermediary would usually be part of the determination of the existence or otherwise of the contract. However, there could possibly be a situation in such circumstances where the need for a declaration might arise. As the intermediary is not a stranger to the contract in the way in which the reinsurers were strangers to the contract between the insured and the insurer in *Meadows* and, if there were in issue disputed rights, it could then be appropriate to consider whether there was jurisdiction to grant declaratory relief. However, as I have come to the clear view that the court has no jurisdiction for other reasons and as it is those circumstances that give rise to the Owners' application for the form of declaratory relief sought, I do not consider that

this issue, given my conclusions on the other issues, is one that it is either necessary or desirable for me to decide as an independent issue.

Issue 5: How should the Court exercise its discretion to order service out?

66. I will assume for this purpose that, contrary to the conclusions to which I have come, I had decided the first three issues in favour of the Owners. On that assumption there would be jurisdiction for the Court to permit service of the arbitration application in Norway in relation to the determination of the issue as between the Owners and the Brokers as to whether or not there was a concluded agreement between the Owners and Bao Steel.

67. If the court decided that there was no contract between Bao Steel and the Owners, it was common ground for the purpose of this application that any claim against the Brokers would have to be pursued in Norway and by reference to the law of Norway. Thus it seems to me that the purpose of the Owners' attempt to invoke the jurisdiction of this Court is to force the Brokers to support their case as against Bao Steel and, in the event they fail against Bao Steel, to have established some form of issue estoppel that they can use against the Brokers in any future proceeding in Norway.

68. The purpose of making an arbitration application of this kind would generally be for the purpose of furthering the conduct of the arbitration. In this particular case, on the assumption (which I make for the purpose of the exercise of my discretion) that the Owners are entitled as against Bao Steel to pursue the application for a declaration at this time, that application would proceed in any event. Joining the Brokers into that application for the purposes I have identified is not necessary for the arbitration and will have the consequence that the Brokers might be subjected to two sets of proceedings -one before this court and one in Norway. I do not think that in those circumstances it would be proper to exercise the court's jurisdiction to compel the Brokers to become parties to proceedings brought against them by Owners in London, when they will be subject to the risk of further proceedings in Norway by the Owners.

69. I would therefore have exercised my discretion against permitting service out in this case.

Conclusion

70. I therefore set aside the service of the arbitration claim form on the primary ground that this Court has no jurisdiction because of the terms of the Lugano Convention. I have set out my views of the other issues raised, but the terms of the Lugano Convention are a clear, short and sufficient reason why the service of the arbitration claim form must be set aside.

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