THIS IS THE APPROVED JUDGMENT SUBJECT TO EDITORIAL CORRECTIONS

IN THE HIGH COURT OF JUSTICE 2000 Folio No: 576

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Before:

The Hon. Mr. Justice Aikens

B E T W E E N:

Navigation Maritime Bulgare
(A Company Incorporated Under the Laws of Bulgaria)

Claimants

-and-

(1) Rustal Trading Limited
(A company incorporated under the laws of Ireland)

(2) Axa Global Risks
(A company incorporated under the laws of France)

(3) AGF Mat S.A.
(A company incorporated under the laws of France)

(4) S.I.A.T.
(A company incorporated under the laws of Italy)

(5) Le Continent S.A.
(A company incorporated under the laws of France)

(6) Groupama Navigation & Transports
(A company incorporated under the laws of France)

(7) Rustal Trading Limited
(A company incorporated under the laws of the British Virgin Islands)

(8) Hilal Bitar Group t/a Al Bitar Trading
(A company incorporated under the laws of Bulgaria)

(9) Al Bitar Group t/a Al Bitar Trading
(A company incorporated under the laws of Bulgaria)

(10) Al Bitar Trading Est
(A company incorporated under the laws of Bulgaria)

Defendants

Andrew Baker Esq. instructed by Holman Fenwick & Willan appeared on behalf of the Claimants.
Michael McParland Esq. instructed by Shaw and Croft appeared on behalf of the 1st to 7th Defendants.

I direct pursuant to CPR Part 39 P.D. 6.1. that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

The Hon. Mr. Justice Aikens

NAVIGATION MARITIME BULGARE

Claimants

and

RUSTAL TRADING LIMITED *et al*

Defendants

"IVAN ZAGUBANSKI"

JUDGMENT

1 This case raises the vexed question of whether an application to the Court for an anti-suit injunction to enforce an English arbitration clause falls within ***Article 1(4)*** of the Brussels and Lugano Conventions, which excludes "*arbitration*" from their scope. That point was referred to the European Court of Justice ("ECJ") by the Court of Appeal in ***Toepfer International GmbH v Societe Cargill France [1999] 1 Lloyd's Rep 379***, but the case settled before the matter could be dealt with by the ECJ. There have been a number of English first instance cases where the ambit of the "arbitration exclusion" in Article 1(4) has been discussed. Various views have been expressed. I will have to replough the same ground.

2 The Brussels/Lugano Convention issue arises in the present case because the Claimant shipowners have issued a Claim Form seeking a final anti-suit injunction to restrain the First to Fifth Defendants, representing cargo interests, including insurers, from pursuing court proceedings in Marseille and elsewhere. The Shipowners say that the cargo interests are bound by arbitration clauses in Bills of Lading to refer any disputes to arbitration in London. The Shipowners also claim a declaration as to the validity of the arbitration agreement. They say that the London arbitration clauses give the English Court jurisdiction over Defendants the to grant anti-suit injunctions by virtue of ***CPR Part 6.20 (5)(c)*** or

the ***Arbitration Practice Direction paragraph 8.1***. The cargo interests say that the claims made by the Shipowners fall within the scope of the Brussels/Lugano Conventions. They say that the cargo interests must be sued in the courts where they are domiciled (under ***Article 2***) and no special jurisdiction of the Conventions can be invoked. The cargo interests also make a wholesale challenge to the principle that an English Court can grant an anti-suit injunction against a party that is domiciled in a Brussels/Lugano Convention Contracting State.

THE PARTIES

3 The Claimants are Bulgarian shipowners ("the Shipowners"). They are the owners of the dry cargo vessel "***Ivan Zagubanski***", which I shall refer to as "the Vessel". The shipowners own a fleet of about 100 vessels, amongst which is also the "***Stanko Staikov***". The Shipowners are insured in respect of liability for cargo claims by the West of England P&I Club, which I shall call "the Club". Mr Robert Searle of the Club dealt with the dispute that has arisen between the Shipowners and the Defendants.

4 The vessel was chartered by a voyage charter on the Synacomex 90 form and dated 2 March 2000 to Richmond Commodities Limited, (a British Virgin Islands company - "Richmond"), for the carriage of a cargo of 13,000 tonnes of bagged rice from South China to the Mediterranean or Black Sea. It seems likely that Richmond was the "in-house" chartering company for the Rustal group of companies, which are managed or represented by Rustal SA, a Swiss company based in Geneva.

5 Pursuant to the charterparty the Vessel went to Zhangjiagang. There the First Defendants, Rustal Trading Limited, an Irish company, shipped on board a cargo of 13,000 tonnes of bagged rice. On 5 April 2000 thirteen bills of lading on the Congen form were issued. Each bill of lading acknowledged the shipment of

1000 tonnes of bagged rice. I will deal with the details of the bills of lading below.

6 The cargo was insured by at least four insurers, who are the Second to Fifth Defendants in these proceedings. The Fourth Defendants, SIAT, are incorporated in Italy. The Second, Third and Fifth Defendants[1] are all incorporated in France. I will refer to them as the "Insurer Defendants". They all claim that they are involved in the settlement of cargo claims that are made by the cargo interests. The Insurer Defendants wish to pursue those claims, by subrogation, against the Shipowners. It is now established that the Sixth Defendant insurer is not involved; but an associated French company, GAN Incendies-Accidents, is. It agrees to abide the outcome of this hearing.

7 The Seventh Defendants, Rustal Trading Limited (a BVI company - "Rustal BVI") are an associated company of the first Defendant. Rustal BVI was named as the shipper of the cargo of bagged rice in proceedings that were begun by cargo interests in Varna, Bulgaria. Although the part played by the Seventh Defendants in those proceedings may be relevant as part of the history of these proceedings, it is now accepted that Rustal BVI has no interest in the cargo.

8 The Eighth, Ninth and Tenth Defendants[2] claim to be the receivers of some of the cargo of bagged rice. They assert that they (or through them the Insurer Defendants) are entitled to make claims against the Shipowners for cargo claims.

9 Ultimately, it appears, all these claims are made for the benefit of the Insurer Defendants (and for any further cargo insurers there may be).

THE FACTS

10 **The charterparty terms**

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[1] That is: Axa Global Risks; AGF Mat SA; Le Continent SA

[2] These are, respectively: Hilal Bitar & Sons Co, a Lebanese company; Al Bitar Group trading as Al Bitar Company; and Al Bitar Trading Est. The last two are Bulgarian companies.

The charterparty terms are not relevant except for three particular provisions.

The first of these is Clause 17, which states:

> "*Arbitration in London, English law to Apply as per LMAA Rules...*"

The second relevant provision is the London Maritime Arbitrators' Association "*LMAA Arbitration Clause*", which was attached to the charterparty. That provides as follows:

> "*All disputes or differences arising out of or under this contract which cannot be amicably resolved shall be referred to arbitration in London.*
> ....
> *This contract is governed by English Law and there shall apply to all proceedings under this clause the Terms of the London Maritime Arbitrators Association current at the time when the arbitration proceedings were commenced. All appointees shall be members of the Association...*"

The third relevant provision is Clause 52, which permits the charterers (in certain circumstances) to replace the bills of lading as first issued with new bills of lading. That is what happened in this case.

11 **The bills of lading**

On 5 April 2000 thirteen bills of lading were issued, each acknowledging shipment of 1000 tonnes of bagged rice on board the Vessel at the load port, Zhangjiagang. The bills of lading were all in the Congenbill 1994 form. On their face, the bills of lading specifically referred to the voyage charterparty dated 2 March 2000. They also stated: "*For conditions of carriage see overleaf*". On the reverse side of the Bills of Lading the "*Conditions of Carriage*" provided as follows:

> "*(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the law and Arbitration Clause, are herewith incorporated*".

12 Seven of the original bills of lading were cancelled and replaced by four new bills

of lading, pursuant to Clause 52 of the charterparty. The four new bills of lading (covering 7000 tonnes of the cargo) were also on the Congenbill 1994 form and each was dated 5 April 2000. One of the four (bill of lading BGC 1) covered 3000 tonnes of the cargo. It stated that the discharge port for that portion of the cargo was Mersin, Turkey. The other three bills of lading were, respectively, for 3000 tonnes (BGC 2) and two lots of 500 tonnes (BGC 3 and 4). They indicated that the discharge port would be Varna, Bulgaria. Each of the four bills of lading referred specifically to the voyage charterparty and contained the same Conditions of Carriage as I have set out above.

13 Subsequently the Mersin bill of lading was replaced by three further bills of lading, which were issued in London dated 16 June 2000 and numbered BCP 3, 4 and 5. They were also on the Congenbill 1994 form. Each referred to the voyage charterparty and contained the same Conditions of Carriage.

14 Although Mr McParland, appearing for the First to Fifth defendants, was not able to admit the point, it is clear enough for present purposes that, as a matter of English law, the London arbitration clause was incorporated into the contracts of carriage evidenced by each of the bills of lading I have referred to above.

The accident on the voyage from China

15 On about 21 April 2000 there was an explosion on board the Vessel whilst she was crossing the Indian Ocean, making for her first discharge port of Mersin. The explosion was in way of the superstructure between holds 3 and 4. The exact cause of the explosion is in dispute, but was probably the result of repair work by the crew near an air-vent pipe to the No 5 port side fuel tank. The explosion resulted in a fire in the fuel tank. There was then a second explosion in fuel tank No 5, which is situated between cargo holds Nos 3 and 4.

16 The cargo interests have alleged that the explosions and fire caused extensive

damage to the bagged rice cargo in holds Nos 3 and 4. Their experts say that the damaged rice is unfit for human consumption as a result of this damage.

17 The cargo interests say that they were not informed by the Vessel or the Shipowners of the explosion and the damage to the cargo until 8 May 2000. Then the Vessel was about to arrive at Mersin, Turkey.

18 The First Defendants wished to appoint experts to inspect the cargo and the Vessel. They appointed Catoni Maritime at Mersin. They also retained Mr Brian Cushing of Cushing Associates. In addition they decided to apply to the Tribunal de Commerce in Marseille for the appointment of a Court expert. This is what has given rise, ultimately, to the present proceedings and the Claimants' applications for an anti-suit injunction against the Defendants.

The Defendants' application to the Marseille Court

19 On 17 May 2000 Mr Bruno-Stephane Duron of Groupe Eyssautier of Marseille (who are insurance brokers and claims handlers) telephoned Mr Searle of the Club. Mr Duron stated that the cargo interests, who had only just learned of the explosion that had occurred on 21 April, wished to send a surveyor on board the Vessel. She was then at Mersin, waiting to discharge the Mersin cargo. It was agreed that cargo interests should be permitted to send surveyors, including English fire and cargo experts, on board at Mersin.

20 Mr Duron also raised the issue of security for the potential cargo claims. He and Mr Searle discussed the question of jurisdiction for any disputed cargo claims. Both agreed that Turkey would not be suitable. Mr Searle pointed out the arbitration provisions in the bills of lading. He said that the Club would be willing to provide a Club Letter of Undertaking as security for any cargo claims, which would be triggered by a London arbitration award. Mr Duron stated that he was not in favour of London arbitration because of a previous unfortunate

experience. He proposed that security be given which agreed that the cargo claims should be litigated in the Marseille Court. Mr Searle was not prepared to agree to this and said so.

21 The Club's position was set out in a long fax from Mr Searle to Mr Duron the following day, 18 May 2000. In that Mr Searle repeated the offer of a Letter of Undertaking, or a bank guarantee as an alternative. He reiterated that the Club's preferred tribunal for any disputes was London arbitration; both for obvious contractual reasons and for practical ones. He also pointedly stated that the English courts had:

> "*a unique power to issue injunctions of world-wide effect restraining parties from pursuing proceedings outside the English jurisdiction where there is a valid agreement under English law to arbitrate disputes in England*".

Mr Searle asked Mr Duron to consider these matters.

22 However on 18 May Mr Duron took positive action. He instructed the advocates SCP Scapel-Grail Bonnaud to apply to the Tribunal de Commerce de Marseille to appoint (under Article 106 of the Commercial Code) a judicial expert to board the Vessel at Mersin to investigate the accident. The application was made on behalf of the Insurer Defendants, "Rustal Trading Ltd" of Geneva, who were described as the shippers, and the Sixth Defendants, who (as stated above) are also insurers, but not actually interested in this cargo. The application was made in respect of all the cargo. Although the application identified the bills of lading, there was no reference to their terms, in particular clause one of the Conditions of Carriage. The application was granted and Mr Robert Vissiere was appointed as Court Surveyor.

23 When Mr Searle learned of this he sent another long fax to Mr Duron on 19 May 2000. In that he stated that the Shipowners had appointed Mr Mark Hamsher as arbitrator in respect of:

> "*all disputes arising out of the charter party dated 2 March 2000 and each bill of lading contract in connection with the voyage from China to Turkey and other ports with a cargo of 13,000 tonnes of bagged rice. "*

Mr Searle called on the cargo interests to appoint their arbitrator within 14 days. However, he also said that the cargo interests had made it plain in discussion and by obtaining the appointment of a Court Surveyor that they intended to pursue any claims through the French courts rather than London arbitration. He invited the cargo interests to confirm that they would proceed by arbitration in London and that the appointment of the French Court surveyor would be terminated. He continued:

> "*If the cargo interests and underwriters do not do so, then the owners reserve the right to take appropriate legal steps. In the meantime, the owners have decided not to permit the court surveyor to attend on board the vessel*".

24 Mr Duron replied to Mr Searle on 22 May 2000. He said that the cargo interests were entitled to apply to the French Court for the appointment of a Surveyor. He noted that Mr Hamsher had been appointed arbitrator. He said that:

> "*this procedure does not concern neither the interested parties on the goods, nor the subrogated underwriters we represent... Moreover, as indicated in this matter the interested parties on the goods and the underwriters maintain their request for a competence Tribunal de Commerce de Marseille*".

The application to Longmore J on 23 May 2000

25 On 23 May 2000 Holman Fenwick & Willan ("HFW"), who had been appointed solicitors for the Shipowners sent a fax to Mr Duron. They told him that, in view of the indication that the cargo interests' intention was to pursue claims other than by London arbitration, the Shipowners had obtained an order from the Commercial Court for an "anti-suit" injunction.

26 The order had been granted by Longmore J on 23 May 2000. It was made against

the applicants to the Marseille Court. It restrained them from continuing or taking any further steps in the legal proceedings before the Marseille Court and also from starting any further proceedings against the Shipowners in any court or tribunal other than a London arbitration tribunal constituted according to the arbitration clauses in the bills of lading.

27 At the same time Longmore J had granted the claimant Shipowners permission to issue and serve a Claim Form and Application Notice against the First to Sixth Defendants out of the jurisdiction. The Claim Form sought two forms of relief.

(1) First, it sought a declaration that the London arbitration clause in the charterparty of 2 March 2000 was validly incorporated into all Bills of Lading dated 5 April 2000 and was binding upon the First to Sixth Defendants.

(2) Secondly it sought an injunction to restrain the Defendants from proceeding with claims arising out of those Bills of Lading in any other forum or jurisdiction save London arbitration.

28 Subsequently the Claim Form was amended with the permission of David Steel J so to include the Seventh to Tenth Defendants. The same relief was sought against those defendants.

29 The Application Form sought continuation of the anti-suit injunction against the First to Sixth Defendants.

The response to the Claimants' application for an anti-suit injunction

30 Mr Duron replied to the news of an anti-suit injunction in a fax to HFW on 24 May 2000. He pointed out that the Marseille Court had appointed Mr Vissiere on 18 May, but the order of the Commercial Court was only obtained on 21 May - in fact it was the 23 May. He continued:

> "*There are two proceedings in "litispendence" (sorry we do not know the translation in English). We think that the first action is valid*".[3]

Mr Duron reiterated his point that the Turkish and Bulgarian bill of lading holders and the cargo underwriters were not concerned with the arbitration clause in the charterparty. He acknowledged that "*in this respect there is a big difference between the French law and the English law. We cannot help it*".

Mr Duron noted the willingness of the Shipowners to provide security. He said that this would:

> "*solve part of the problems, subject of course that this bank caution does not mention that the dispute will be settled by arbitration in London. For the reasons given here above this claim must not go to arbitration in London*".

31 On 24 May 2000 the Vessel completed her discharge of the Mersin cargo. She then proceeded to Varna to discharge the remainder of the cargo.

The proceedings before the Varna Regional Court

32 On 30 May 2000 proceedings were begun in the Varna Regional Court by the Seventh Defendant, Rustal Trading Limited of the British Virgin Islands. Mr Baker for the Claimants submitted that it was clear that the proceedings were instigated by Mr Duron of Groupe Eyssautier. He asserted that the BVI company was deliberately used in order to avoid any suggestion that Rustal Trading of Eire had acted in contempt of Longmore J's order. Mr Kenyon of Shaw & Croft, the London solicitors acting for the Defendants, has stated, on instructions from Mr Duron, that the Varna proceedings were mistakenly started by Rustal BVI, but should have been started by the First Defendant. I am not in a position to decide

[3] Mr Duron also noted in this fax that: "*A constant jurisprudence at every level of jurisdiction confirms in France that the charter party cannot be opposed to the third holder of the B/L and, consequently to the Underwriters having the right and interest to sue. That is why we do not quite well understand the initiative taken by the shipowners and the Club through HFW near the English Court*".

whether there was a mistake or the use of the BVI company was a deliberate attempt to avoid an accusation that the First Defendant was in contempt of the order of Longmore J. Nor is it necessary to decide the point in order to deal with the present applications.

33 However I note that the Second Defendant in the present proceedings[4] is specifically mentioned in the Varna Court application as being the underwriter who had applied to the Marseille Court for the appointment of a Court Expert. That reference must have been deliberate. The information concerning the involvement of the Second Defendant in the Marseille Court proceedings could only have come from either Mr Duron or the Marseille lawyers.[5]

34 Rustal BVI applied for an order that the Shipowners give access to the Vessel to the expert appointed by the Marseille Court, Mr Robert Vissiere. The application identified one of the bills of lading and the fact that its terms provided for disputes to be referred to arbitration in London. The application stated that the Marseille Court had made an order for the appointment of a legal expert who should inspect the Vessel and the cargo. It then referred to various Bulgarian laws giving the Varna court the power to make orders to facilitate obtaining evidence in support of foreign arbitrations. In view of the clear statement that had already been made by Mr Duron, on behalf of Axa Global Risks, the current Second Defendants, that there should not be a London arbitration, the suggestion that the application to the Varna Court was to aid a London arbitration appears, at the least, disingenuous.

35 The Varna Court did not grant the order as sought. Instead on 31 May 2000 the Court ordered that a Bulgarian expert, Mr Sirakov, be appointed as court marine

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[4] Axa Global Risks, one of the insurers incorporated in France

[5] I also note that the Marseille Court order was appended to the application to the Varna Court

engineering expert. A local explosives expert and valuer were also to be appointed. The court also ordered that the Shipowners must cooperate with the investigations on board the Vessel by those local experts.

Further Correspondence between Mr Duron and the Club

36 Mr Duron faxed Mr Searle of the Club on 5 June asking whether he had any further proposals to make on two issues.[6] First, on the question of security for the intended cargo claim; he reiterated that the cargo interests wanted security of US$ 2,650,000. Secondly he reasserted the suggestion that the Tribunal de Commerce de Marseille be given competence. He also confirmed that the cargo interests and underwriters had been informed of the anti-suit injunction granted by Longmore J. He said: "*our clients consider that this procedure does not concern them*".

37 On 21 June 2000 the Shipowners issued an Application to join Rustal BVI as Seventh Defendants in the English proceedings. The Application also sought an anti-suit injunction against this BVI company. At that stage it was contemplated that this application would be heard on the return date for the hearing to renew the "without notice" injunction granted by Longmore J on 23 May. That hearing was originally going to take place in June or July 2000.

38 Then on 28 June 2000 the Ninth and Tenth Defendants, both Bulgarian companies, ("the Al Bitar Defendants"), directly faxed the Shipowners. Claiming that they were acting on advice from "an international law firm",[7] they asked for a letter of guarantee "*to secure our claim payment from our insurance company*". The Al-Bitar Defendants provided a draft of the letter of guarantee. It stated that payment would be against a judgment of the "*competent court*". There was no

[6] These had been raised in Mr Duron's fax to Mr Searle of 22 May 2000, referred to above at para 24.

[7] Subsequently Shaw & Croft, who only act for the First to Sixth Defendants, stated that they were not the "*international law firm*" referred to in the fax.

mention of London arbitration. Mr Searle replied on 30 June asking for details of Al-Bitar's insurers and lawyers. The Al-Bitar Defendants replied saying that they had been given the terms of the letter of guarantee by their lawyers and that the text was "*not subject to modification*".

39 The Club replied on 4 July 2000 that it would consider providing a letter of guarantee but the terms should provide for payment against an award in London arbitration in accordance with the arbitration clause incorporated in the bills of lading. The fax also stated:

> "*May we... remind you that the validity of the London arbitration clause incorporated in to the bills of lading... has already been recognised by the Bulgarian court of Varna*".[8]

40 The response of the Al-Bitar Defendants (in a fax of 6 July) was to reiterate their demand for a guarantee referring to the "*competent court*". They insisted that this was a standard format and questioned why the Club and the Shipowners would not provide a guarantee in this form.

The Further Proceedings in the Marseille Court

41 It proved impossible to fix the hearing of the renewed application of the Shipowners for an anti-suit injunction against the original six Defendants and also the Seventh and Eighth to Tenth Defendants. So on 12 July there was a directions hearing before Moore-Bick J. He fixed the further hearing for 6 October 2000. In fact the hearing took place on 11 and 12 October 2000.

42 On 13 July 2000, the Tenth Defendant, represented by SCP Scapel, Scapel-Grail Bonnaud,[9] ("SCP") made a new application to the Marseille Court. This was for

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[8] This is a reference to the ***Decision of the Varna Regional Court Eleventh Jury dated 31 May 2000***. That had referred to the fact that future claims under the bills of lading "*can be arbitrated according to the arbitration clause in the contract itself, referring to the rules of the London Association of Sea Arbiters (sic)*".

[9] The same Marseille lawyers who had obtained the appointment of the Court Expert on behalf of Rustal and the five insurers.

the arrest of the "***Stanko Staikov***", which is a sister ship to the "***Ivan Zagubanski*****".** The Tenth Defendants stated that the purpose of the arrest was to obtain security of US $500,000 for claims for damage to cargo carried under the bills of lading BCG2 and BCP 1-4. The application did not refer to the existing English proceedings or the fact that the Shipowners had already referred disputes arising out of these bills of lading to arbitration in London.

43 The Marseille Court ordered the arrest of the "***Stanko Staikov***" the same day. The order also provided that the applicant had to commence substantive proceedings within 30 days, or else the arrest would be annulled.

44 In response to this arrest, HFW'S Paris office wrote to SCP on 18 July 2000, offering a Club Letter of Undertaking for US$500,000. They proposed that payment would be made upon presentation of an arbitration award following a London arbitration. SCP replied that the wording should be in a standard form, in French. This referred to payment against "*un jugement executoire rendu par le Tribunal competent, soit par suite d'un accord amiable intervenu entre les parties...*".

45 HFW Paris then reluctantly agreed to provide a Club Letter of Undertaking that referred to "*la jurisdiction competente*", whilst maintaining their position that the London arbitration clause should be applied.

46 Mr Kenyon of Shaw & Croft (who do ***not*** act for the Tenth defendants) has confirmed[10] that on 11 August 2000 the Tenth Defendants started proceedings in the Marseille Court in order to maintain the validity of the arrest of the "***Stanko Staikov***". Those proceedings have not got any further. But I was informed[11] that the first procedural hearing would take place on 17 November 2000.

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[10] First witness statement dated 1 September 2000 at para 55

[11] In the second witness statement of Mr Pierce of HFW, dated 25 September 2000, at para 19

The Proceedings in England leading to the current hearing

47 On 21 July 2000 the shipowners applied and obtained from David Steel J leave to amend the Claim Form to add the Seventh to Tenth Defendants. He also granted permission to serve the amended Claim Form on the Seventh to Tenth Defendants out of the jurisdiction. The judge also granted the Claimant Shipowners an injunction to restrain those defendants from prosecuting any of the existing non-English proceedings and from commencing or prosecuting any other proceedings in respect of the bills of lading claims, except in London arbitration.

48 During September 2000 the Claimant Shipowners and the First to Sixth Defendants filed further evidence. It was also agreed between HFW and Shaw & Croft that the proceedings against the Sixth and Seventh Defendants should be discontinued and the injunctions granted against them by Longmore J and David Steel J respectively should be discharged. Consent Orders to this effect were agreed during the course of the hearing on 11 and 12 October.

THE PARTIES' APPLICATIONS

49 At the start of the hearing before me on 11 October 2000 the only effective Application was that of the Claimants for the continuation of the interim "anti-suit" injunctions against the First to Fifth Defendants, that had originally been granted by Longmore J. No application was made by the Claimants in relation to the Eight to Tenth Defendants.

50 The First to Fifth Defendants were all represented in England by Shaw & Croft and Mr Michael McParland.[12] Although it was clear from the first witness statement of Mr Kenyon that their argument was that the English Court had no

[12] They were, of course, all represented in the Marseille proceedings by SCP of Marseille

jurisdiction to grant anti-suit injunctions against those defendants,[13] they had not made any applications under the ***CPR Part 11*** to set aside the proceedings. When I asked about the procedural position, Mr McParland acknowledged that, formally, those Defendants should be making an application under ***CPR Part 11***. Mr Baker for the Claimants did not object to such an application being made late. I gave leave for one to be made out of time.

51 The Application Form was issued by the First to Fifth Defendants on 1 November 2000, nearly three weeks after the hearing before me was concluded. In summary it sought the following relief:[14]

(1) a declaration that the English court had no jurisdiction over the First to Fifth Defendants because:

  (a) they are all subject to the Brussels or Lugano Conventions; and

  (b) the anti-suit injunction relief sought by the Claimants did not fall within the "arbitration exception" of Article 1(4) of those Conventions; and

  (c) the English Court did not have jurisdiction under Articles 2, 5(1) or 24 of the Conventions.

(2) As a consequence of (1), an order setting aside the proceedings, their service out of the jurisdiction and the injunction granted by Longmore J against the Insurer Defendants.

(3) As an alternative to (1) and (2), that as a matter of discretion the court should not grant an anti-suit injunction against the Insurer Defendants, given the state of the evidence before the Court.

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[13] See Mr Kenyon's first witness statement para 3. Mr Kenyon submitted in his witness statement that therefore the permission to serve the Claim Form out of the jurisdiction should be set aside. The alternative argument was that, as a matter of discretion the English court should not grant the anti-suit injunctions sought.

[14] The Defendants' Application Form refers to the Sixth and Seventh Defendants, even though by 1 November 2000 Consent Orders had been signed dismissing those defendants from the action. So I will not refer to the Sixth and Seventh Defendants hereafter.

THE SUBMISSIONS OF THE PARTIES

52 Mr Baker for the Claimant Shipowners submitted as follows:

(1) The questions of who is bound by the Bill of Lading contracts and whether the arbitration clause is incorporated into the Bills of Lading are to be decided according to English law. That is because English law is the law of the forum and the putative proper law of the Bills of Lading in general and the arbitration agreement in particular.

(2) Rustal, the First Defendants, are party to all the Bills of Lading dated 5 April 2000 as a matter of English law. This is because, on the admission of Mr Kenyon, it was the actual shipper of the cargo.[15] It is therefore bound by the Bill of Lading terms.

(3) Applying well established English law principles, the arbitration clause in the charterparty was incorporated into the Bill of Lading contracts. This is by virtue of (i) the express reference to the charterparty "*Arbitration Clause*" in Condition (1) of the Bill of Lading Conditions of Carriage; (ii) the identification of the charterparty on the face of the Bills of Lading; (iii) the fact that clause 17 of the charterparty was an arbitration clause that referred to further specific provisions that were attached to the charterparty; (iv) those terms provided for "*all disputes arising out of or under this contract*" to be referred to arbitration in London. Thus the arbitration provisions were not limited to disputes arising under the charterparty itself, but were broad enough to include other contracts into which the arbitration provision were incorporated.

[15] Mr Kenyon's first witness statement: para 4. It is also asserted by SCP in the applications to the Marseill Court for the appointment of a Court Expert and for the arrest of the "***Stanko Staikov***". In fact a Chinese entity is named as shipper in the Bills of Lading that were originally issued. Rustal Trading Ltd is named in the replacement Bills of Lading dated 5 April 2000 and also those dated 16 June 2000.

(4) The Insurer Defendants, by claiming (in particular in the Marseille proceedings for the appointment of a Court Expert) to be subrogated to the rights of the cargo interests[16] must be equally bound by the terms of the Bills of Lading including the arbitration clause: ***Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's Rep 279, particularly at 285-6 per Hobhouse LJ.***

(5) The claims made in the Claim Form for declarations and an anti-suit injunction are claims in respect of a contract (the arbitration agreement) which is expressly governed by English law. Therefore the English Court has jurisdiction to permit service of the proceedings on the First to Fifth Defendant out of the jurisdiction by virtue of ***CPR Part 6.20 (5)*** provided that there is at least a "good arguable case" that there is such an agreement. That must be so in this case.

(6) Alternatively the Court has jurisdiction because the claims fall within ***paragraph 8.1*** of the Arbitration Practice Direction, because (i) it is arguable that there is an arbitration agreement; and (ii) the "seat" of the arbitration must be in England and Wales.[17]

(7) The English Court is the appropriate forum in which to determine the English law question of whether the Defendants are bound by the arbitration clauses in the Bills of Lading and whether the arbitration clause should be enforced by an injunction.

(8) The claims for a declaration and an anti-suit injunction fall within ***Article***

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[16] This was done expressly in the application for the appointment of a Court Expert, where the Insurer Defendants were named as applicants.

[17] ***Para 8.1 of the Arbitration Practice Direction*** permits service of arbitration proceedings out of the jurisdiction where the"*seat*" of the relevant arbitration is in England and Wales. The statutory concept of a "*seat*" of an arbitration was introduced by ***sections 2 and 3 of the Arbitration Act 1996***.

1(4) of the Brussels and Lugano Conventions.[18] Therefore they are excepted from the jurisdiction provisions of those Conventions.

(9) If that is wrong, then the English Court has jurisdiction over the First to Fifth Defendants under ***Article 5(1)*** of the Conventions because: (i) the First to Fifth Defendants were domiciled in Convention states; and (ii) the claims in the Claim Form involved "*matters relating to a contract*", ie. the contract to arbitrate disputes which is incorporated into the Bills of Lading; and (iii) London, England is the "*place of performance of the obligation in question*". That obligation is the specific one contained in the arbitration agreement to refer all future disputes to arbitration in London.

(10) Alternatively under ***Article 24*** of the Conventions the Claimants can sue the Defendants for "*such provisional, including protective, measures as may be available under [English] law*", even where proceedings have been or may be commenced on the substance of the matter elsewhere. In this case there is a real link between the subject matter of the measure sought (injunctions) and the English jurisdiction.

(11) The Defendants do not advance any independent ground why the court should not exercise its discretion to grant permission to serve the proceedings out of the jurisdiction. Nor do they demonstrate any independent[19] "*strong reason*" why the Court should not grant an anti-suit injunction.

53 Mr McParland for the First to Fifth Defendants submits as follows:

(1) It is not accepted that the First Defendant as shipper or the Insurer

[18] Even though the wording of the two Conventions is the same and the same principle would apply to both, in this case the Defendants are all domiciled in Brussels Convention states. So I will in future only refer to the Brussels Convention in this judgment.

[19] This is as opposed to the reasoning based on the Brussels/Lugano Convention.

Defendants are, as a matter of law, bound by the arbitration agreement referred to in Condition One on the reverse of the Bills of Lading. However, no positive arguments are advanced to the contrary. The Court is asked to note that it appears that the issue of incorporation of arbitration clauses in Bills of Lading is treated differently by French law.[20]

(2) Even if there is an arguable case that the arbitration clause is incorporated in the Bills of Lading, the English Court has no jurisdiction in respect of the two heads of claim made in the Claim Form: ie. the declaration and injunction claims. This is because: (i) each of the First to Fifth Defendants is domiciled in a Convention state; (ii) those claims do not come with the "arbitration exception" in ***Article 1(4)*** of the Brussels Convention; (iii) therefore the Conventions must apply and, under ***Article 2***, the Defendants must be sued in their country of domicile, that is Eire, France and Italy; (iv) ***CPR Part 6.20 (c)*** has no application to this case.

(3) The Claimants cannot utilise ***Article 5(1)*** of the Conventions to found jurisdiction. That Article must be construed restrictively. In any event, ***Article 5(1)*** cannot be used to evade the strict requirements of ***Article 17*** which sets out the rules on jurisdiction agreements between parties.

(4) The alternative reliance on ***Article 24*** was not advanced before Longmore J; the Claimants should not be permitted to rely on it. In any case ***Article 24*** cannot be used to found jurisdiction for the grant of either the declaratory relief or the anti-suit injunctions that are sought against the Defendants. Neither are "*provisional*" or "*protective measures*" within ***Article 24***. Further, the declaratory relief and anti-suit injunctions sought against the Defendants domiciled in Eire, France and Ireland are not

[20] See the comment of Mr Duron in the fax to Mr Pierce of HFW on 24 May 2000

related to the territorial jurisdiction of England and Wales.

(5) Even if the English Court has jurisdiction and whether or not the Brussels Convention applies, the concept of the anti-suit injunction is inimical to the regime of the Brussels Convention and so should not be invoked even if the Convention does not strictly apply. The French and other Convention states' Courts would regard an anti-suit injunction as a gross and offensive intrusion on their jurisdiction. Therefore the English Court should not, in principle, consider granting an anti-suit injunction where to do so would or might offend the Court of another Convention state in which the Defendants are domiciled. See the remarks of the Court of Appeal in ***Philip Alexander Securities v Bamberger [1997] 1 L Pr 73 at para 48 per Leggatt LJ***.

(6) Further, as a matter of the Court's discretion the anti-suit injunctions should not be continued and should not have been granted in the first place. This is because: (i) the applications of the First to Fifth Defendants to the Marseille Court for the appointment of a Court Surveyor did not constitute taking substantive proceedings in the French Courts; (ii) there is no evidence that the Defendants have acted or threaten to act in a way that is in repudiatory breach of the arbitration agreements in the Bills of Lading, even if they bind the Defendants; (iii) the acts of the Tenth Defendants in obtaining the Marseille Court order for the arrest of the "***Stanko Staikov***" are not relevant.

THE ISSUES FOR DECISION

54 As I have already stated, Mr McParland did not make any positive case against the submissions of Mr Baker that (i) English law must govern the question of whether the Defendants were bound by the arbitration agreement referred to in

the charterparty and the Bills of Lading; (ii) on the facts and well established English law principles the arbitration agreement was incorporated into the Bill of Lading contracts; and (iii) the arbitration agreement in the Bill of Lading contracts bound both the First Defendants (as shippers) and the Insurer Defendants who asserted a right to claim by subrogation. In my view the submissions of Mr Baker on these points are correct. The facts are sufficiently clear and the English law principles so well known that there is no need to elaborate my reasons in reaching this conclusion.

55 On that basis, then the first issue for decision must be whether the jurisdiction of the English Court is governed by ***CPR Part 6.19*** and the Brussels/Lugano Conventions or ***CPR Part 6.20 (5) and/or paragraph 8.1*** of the ***Arbitration Practice Direction.*** That depends on whether the claims made in the Claim Form are within the "arbitration exception" in ***Article 1(4)*** of the Brussels Convention. If they are then it is agreed that ***CPR Part 6.20 (5)*** governs the jurisdiction of the English Court to consider the claims. If they are not, then the Convention provisions must rule on that issue.

56 If the ***CPR Part 6.20 (5)*** governs the issue of jurisdiction then, as I understand Mr McParland's argument, he accepts that the English Court would have jurisdiction to entertain the Claims for a declaration and an anti-suit injunction. On that assumption he would accept, for present purposes, that (i) there is an arguable case that the London arbitration agreements bind the First to Fifth Defendants; (ii) there is a serious issue to be tried on whether the Court should grant the declarations and the injunctive relief that the Claimants seek; and (iii) subject to the argument mentioned in the next paragraph, the English forum is the appropriate forum to determine those issues.

57 However Mr McParland says that, as a matter of principle, the English Court should decline to grant an anti-suit injunction because it is so contrary to the

whole scheme of the Brussels Convention and the practice of courts of Contracting States. So the second issue to be decided is whether, as a matter of principle the Court should grant an "anti-suit" injunction, even if the Brussels Convention does not strictly apply.

58 Lastly, on this part of the case, Mr McParland has another two arguments against the exercise of a "discretion" to grant an anti-suit injunction. They are that (i) an anti-suit injunction would be offensive to the French or other Convention State Courts, so the English Court should not exercise its discretion to grant an injunction; (ii) it is not proved that either there has been a breach of the arbitration agreements or that one is threatened by the First to Fifth Defendants. That is the third issue to be decided.

59 If Mr McParland is correct in saying that the "arbitration exception" in ***Article 1(4)*** of the Brussels/Lugano Convention is not applicable to the claims made in the Claim Form, then the fourth issue that I have to consider is whether the English Court has jurisdiction by virtue of ***Article 5(1)*** of the Conventions. If I were to conclude that it did, then the same points as raised under the second and third issues above would then arise.

60 If I conclude that the English Court does not have jurisdiction by virtue of ***Article 1(4)*** of the Conventions, then the fifth and last issue that I would have to consider is whether it has jurisdiction under ***Article 24*** of the Conventions.

The First Issue: are the Claims within the "Arbitration Exception" in Article 1(4) of the Brussels Conventions?

61 Mr McParland submitted that this issue had to be decided and it could not be

evaded by Mr Baker's argument that even if the Convention[21] applied then the Court had jurisdiction by virtue of ***Article 5(1)*** of the Convention. I agree with Mr McParland on this. The issue of whether the Convention governs jurisdiction is central to this case. Moreover, as Mr Baker reminded me, I have no power to request the European Court of Justice to give a preliminary ruling on the ***Article 1(4)*** point, despite the differing views of English judges at first instance. ***Article 2*** of the ***1971 Protocol to the Brussels Convention*** states that the ECJ will only entertain a reference from the House of Lords ir a Court sitting in an appellate capacity.

62 **The wording of Article 1(4)**

Title I of the Brussels/Lugano Conventions is headed "***Scope***". It comes immediately after the ***Preamble***. That explains that the Convention was concluded to implement ***Article 220*** of the Treaty of Rome, with the aim of simplifying the formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals. A second aim identified is to strengthen the legal protection of persons in the European Union. ***The Preamble*** then states that because it is necessary for these purposes to "*determine the international jurisdiction of [the Contracting States]*" the Convention has been agreed. ***Title One*** then consists only of ***Article One***. That provides:

> "*This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*
>
> *The Convention shall not apply to -*
>
> .....
>
> *4. Arbitration*".

[21] Although the wording of the Brussels and Lugano Conventions is identical, so the same point about the scope of ***Article 1(4)*** arises on each, I think strictly only the Brussels Convention is relevant as the 1st to 5th defendants are domiciled in Eire, France and Italy.

63 If the Convention is to fulfil its aim of simplifying the formalities governing the reciprocal recognition and enforcement of judgments, then it must first define the subject matter of judgments that are within its scope. The same definition must obviously also apply to the subject matter that will be subject to the jurisdiction regime of the Convention. The first thing that the Convention does is to determine the rules on the "*international jurisdiction*" of the courts of Contracting States that are subject to the Convention.

64 ***Article One*** states that the general subject matter which is subject to the Convention is "*civil and commercial matters, whatever the nature of the court or tribunal*". Then the categories that are not within the Convention's scope are identified in sub-articles (1) to (4) of ***Article 1***. The last is "*arbitration*" - expressed *tout court*. There is no indication that some issues that concern arbitration that come before a court of a Contracting State are to be included in the Convention. It seems clear that both the matters within the scope of the Convention and those excluded from it could arise in proceedings before a court or tribunal, whatever their nature.

65 Therefore my instinctive reaction to the laconic wording of ***Article 1(4)*** is that where proceedings in a court or tribunal in a Contracting State will result in a judgement where the (or a) principal focus is on "*arbitration*", then those proceedings and any resulting judgment are excluded from the scope of the Convention. The Convention is therefore not intended to give any "*legal protection*" to persons in Contracting states in relation to "*arbitration*" so defined, because "*arbitration*" is outside the Convention's scope.

66 Unfortunately it is not possible to stop with an analysis of the ***Article 1(4)*** wording itself. As an aid to ascertaining the meaning or effect of any provision of the Convention I can (and here I think I must) have regard to the official reports on the Brussels Convention in its original form and as amended upon the

accession of new members of what is now the European Union.[22]

67 The parts of the Report of Mr P Jenard on the Brussels Convention 1968 and the Report of Professor Peter Schlosser on the Accession Convention that considered the scope of ***Article 1(4)*** were analysed in detail by the Mr Advocate General Darmon and the European Court of Justice ("ECJ") in ***Marc Rich & Co AG v Societa Italiana Impianti PA [1991] ECR 3855***. That was one of only two ECJ cases to which I was referred on the subject of the scope of ***Article 1(4)***.[23] Advocate General Darmon's consideration of the Jenard and Schlosser Reports as well as his Opinion generally in the ***Marc Rich case*** are very important. I must obviously deal with the Court's conclusions.

68 ***The Marc Rich case***

Marc Rich were the purchasers of a quantity of crude oil on FOB terms from Societa Italiana Impianti PA ("SII"). The terms were agreed in telexes on 25 and 26 January 1987. Then on 28 January Marc Rich sent a further telex giving more details of the terms of the contract. For the first time the terms included an arbitration clause. SII did not reply to that telex. When the cargo was loaded Marc Rich alleged that it was contaminated and claimed $7 million damages. SII denied liability. On 18 February 1988 SII issued proceedings in Italy for a declaration of non-liability. The proceedings were served on Marc Rich on 29 February 1988. On the same day Marc Rich appointed an arbitrator in London. SII failed to appoint an arbitrator. In May 1988 Marc Rich issued an Originating Summons for the appointment of an arbitrator and obtained leave to serve out *ex parte*. SII applied to set aside that order on the ground that there was no valid

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[22] ***Section 3(3) of the Civil Jurisdiction and Judgments Act 1982 ("CJJA 1982")***, which Act gave the Brussels Convention the force of law in the UK.

[23] The other was ***Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line [1998] ECR 7091.*** In that case the ECJ dealt with the ***Article 1(4)*** point in two short paragraphs: **31 and 32**.

arbitration agreement. Further, SII said that the dispute should be resolved in Italy because the matter was governed by the Brussels Convention as incorporated into English law by the ***CJJA 1982***. The principal issue before the English Courts was whether the Brussels Convention applied to the claim made in the English proceedings or not. Hirst J held[24] that the Convention did not apply. The Court of Appeal held[25] that the issue of construction of ***Article 1*** of the Convention should be referred to the ECJ and it was.

69 Three questions for the ECJ were posed. The first was a general one on the scope of ***Article 1(4)***; and second was on whether, if the Convention did apply, Marc Rich could rely on either ***Article 5(1) or 17*** of the Convention to found jurisdiction in England. The third was whether the English Court should decline jurisdiction or stay the proceedings under Articles 21 or 22.

70 **Mr Advocate-General Darmon's Opinion**

Mr Advocate-General Darmon's Opinion is elaborate and gives a detailed analysis of the structure and scope of the Convention and its relationship with arbitration. The following points in his Opinion seem particularly relevant to the present case:

(1) Before the Brussels Convention there were already important international conventions governing the enforcement of arbitration agreements and awards, particular the New York Convention of 1958.

(2) Although the application before the English Courts in ***Marc Rich*** was for the appointment of an arbitrator,[26] there was a threshold or "preliminary" question that had to be considered: whether an arbitration agreement

[24] ***[1989] 1 Lloyd's Rep 548 at 553***

[25] ***Ibid at 558***

[26] The application was made under the old regime: ***section 10(3) of the Arbitration Act 1950***

existed at all.

(3) The "principal issue" before the English Court was the appointment of an arbitrator.[27] That is not within the Convention.[28]

(4) If the "principal issue" is outside the scope of the Convention, then even if a "preliminary matter" is within the Convention, that cannot bring the whole proceedings within the scope of the Convention.[29] In this case the "preliminary matter" is whether an arbitration agreement exists.[30]

(5) In any event a dispute as to the existence of an arbitration agreement falls outside the scope of the Convention.[31] This opinion is reinforced by the view of paragraph 64 of Professor Schlosser's Report on the Accession Convention.[32]

(6) Whether or not the existence of an arbitration agreement is a preliminary or principal issue, "*it seems that the principal subject-matter of the dispute before the national court relates to arbitration*".[33]

(7) The views of Mr Schlosser (expressed in an opinion prepared specifically for that case when before the ECJ) that the Convention applied to ***all proceedings***[34] before courts must be rejected.[35] They are contrary to the

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[27] Paras 24 and 29 of his Opinion.

[28] At para 30 of his opinion, A-G Darmon says that there is "*no room for any hesitation*" on this point, unless the Court adopted an "updated" view of Mr Schlosser - which A-G Darmon went on to reject.

[29] Para 33 of his Opinion.

[30] Para 30 of his Opinion.

[31] Para 34 of his Opinion.

[32] That states: "*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*".

[33] Para 40 of his Opinion.

[34] A-G Darmon's emphasis at Para 50 of his Opinion.

views expressed in the reports by Mr Jenard and Mr Schlosser on the original Convention and the Accession Convention. They stated:

(a) "*The Brussels Convention... does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration... and does not apply to the recognition of judgments given in such proceedings*"[36]

(b) "*... the 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the dismissal of arbitrators, the fixing of the place of arbitration... In the same way a judgment determining whether an arbitration agreement is valid or not... is not covered by the 1968 Convention*".[37]

(8) The Report of Messrs Evrigenis and Kerameus (on the accession of the Hellenic Republic to the Brussels Convention in 1986) also stated that:

> "*Proceedings which are directly concerned with arbitration as the principal issue... are not covered by the Convention*".[38]

(9) It is not legitimate to suggest that arbitration awards that are made into judgments must be capable of recognition and enforcement under the Convention. They are enforceable under the New York Convention as awards or as judgments "*under bilateral conventions or by domestic law.*"[39] Furthermore, there is no reason for it to be "*desirable*" to apply the Brussels Convention to ***annul*** arbitration awards.[40]

(10) The Brussels Convention should also not apply to the issue of the

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[35] Para 61 *et seq* of his Opinion

[36] The Jenard Report at page 13: ***OJ 1979 C 59***

[37] ***OJ 1979: page 93***; referred to at para 59 of A-G Darmon's Opinion.

[38] ***OJ 1986 C 298 page 10***

[39] Para 70 of his Opinion.

[40] Para 72 of his Opinion.

recognition and enforcement of judgments concerning the existence and validity of arbitration agreements. That is because there is the danger that such a judgment may be given in a state other than the place of the arbitration.[41]

(11) Finally on this aspect of the case[42] he said that the application of the Brussels Convention to determine jurisdiction would undermine international arbitration. That is because arbitration needs the assistance of the courts of the state where the arbitration is to take place in order to aid the arbitration process itself. Yet that court might not have jurisdiction under the Convention unless a special jurisdiction could be invoked by ***Article 5(1) or 17***. But attempts to use those articles to found a court's jurisdiction in relation to arbitration were open to strong objection or criticism.[43]

71 In my respectful view the Opinion of Mr Advocate-General Darmon is comprehensive and its analysis compelling. The theme and overall conclusion of it is that the Brussels Convention does not apply to any court proceedings or judgements in which the principal focus of the matter is "*arbitration*". That includes proceedings concerning the validity or existence of an arbitration agreement; the appointment of arbitrators; ancillary assistance to arbitration proceedings and the recognition and enforcement of awards.

72 Based on his Opinion and the views of Messrs Jenard and Schlosser on which he relies, I would have no hesitation in saying that proceedings in the English Court for (i) a declaration that arbitration clauses bound the Defendants; and (ii) an

[41] Para 76 of his Opinion.

[42] A-G Darmon went on to consider the applicability of ***Articles 5(1) and 17***; raised in the second question posed by the English Court of Appeal.

[43] See paras 77;80 and 82 in particular.

injunction to restrain proceedings in courts in breach (or threatened breach) of binding arbitration agreements fall within the exception in ***Article 1(4)*** of the Convention. That is simply because the principal focus of those proceedings is "*arbitration*".

73 **The decision of the ECJ**

The decision of the ECJ dealt with only two issues. The first was whether proceedings for the appointment of an arbitrator fell within the Convention. The second was whether it made any difference to the answer on the first question that there was a preliminary issue on whether the arbitration agreement was valid. The ECJ generally followed the views of Mr Advocate-General Darmon. The Court concluded that:

(1) The international conventions on arbitration, particularly the New York Convention of 1958, lay down rules on arbitration that must be respected by the courts of Contracting States. The 1958 Convention includes rules on agreements on arbitration as well as awards. It follows that Contracting Parties to the Brussels Convention "*intended to exclude arbitration in its entirety, including proceedings brought in national courts*".[44]

(2) In order to determine whether a dispute fell within the Brussels Convention "*reference must be made solely to the subject-matter of the dispute*". If the subject-matter of the dispute falls outside the scope of the Convention, then the fact that there was a preliminary issue (ie. whether the arbitration agreement existed) could not affect the issue of whether the subject-matter of the dispute fell within the scope of the Convention.[45]

(3) Moreover it would be contrary to the principle of legal certainty "*... for the*

[44] Paragraph 8

[45] Paragraph 26

applicability of the exclusion laid down in ***Article 1(4)*** *to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties* ".[46]

(4) Therefore the litigation in the national court for the appointment of an arbitrator was excluded from the Brussels Convention by virtue of ***Article 1(4)***, "*even if the existence of validity of an arbitration agreement is a preliminary issue in that litigation*".[47]

(5) Having reached this conclusion, the questions concerning the applicability of ***Articles 5(1) and 17*** did not arise.

74 Mr McParland submitted that the decision of the ECJ was narrow and confined to the single issue of whether litigation for the appointment of an arbitrator was excluded from the Convention under ***Article 1(4)***. He is correct about the decision. But that cannot detract from the fact that the Court took a very broad view of the scope of the "arbitration exclusion" in ***Article 1(4)***, as particularly expressed in paragraphs 18 and 21 of its judgment. Nor is there one word of disapproval of the approach of Mr Advocate-General Darmon or his views.

75 When the case was remitted to the English Courts Marc Rich applied for an injunction to restrain SII from continuing its proceedings in Italy. Both Hobhouse J and the Court of Appeal[48] refused to grant an injunction on the grounds that Marc Rich had by then voluntarily submitted to the jurisdiction of the Italian Courts to try the merits of the case.

76 **The subsequent English decisions on Article 1(4)**

I was referred to the following English first instance decisions since the ***Marc***

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[46] Paragraph 27

[47] Paragraph 29

[48] ***[1992] 1 Lloyds Rep 624***

Rich case in which the scope of the "arbitration exclusion" in ***Article 1(4)*** has been considered.

77 ***Partenreederei M/S "Heidberg" v Grosvenor Grain and Feed Co Ltd ("The Heidberg")***[49]

The vessel "***Heidberg***" collided with another in the Gironde estuary. This gave rise to litigation in England and France between shipowners and cargo interests. One issue was whether an arbitration agreement[50] was incorporated into the bills of lading. The Tribunal de Commerce in Bordeaux held that it was not. The proceedings in England raised the same incorporation issue. The cargo interests applied to strike out the English proceedings on the ground that the issue of incorporation had been decided by the French court.

78 The question for the English court was whether it had to recognise and enforce the French judgement under ***Article 25*** of the Brussels Convention. It was argued by the shipowners that the decision fell within the "arbitration exception" in ***Article 1(4)***. Judge Diamond QC, sitting in the Commercial Court, held that it did not and so the French judgment must be recognised. He referred to the ***Marc Rich case*** and the opinion of Mr Advocate-General Darmon in particular. He concluded that the ECJ's decision threw no light on the question of whether proceedings challenging the validity of an arbitration agreement fell within the "arbitration exception".[51] He noted that Neill LJ had said, in the second stage of the ***Marc Rich case***, that the ECJ decision "*gave no guidance in those cases where the challenge to the validity of the agreement constitutes the dispute and*

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[49] ***[1994] 2 Lloyd's rep 287***

[50] There were disputes as to which form of charterparty had been agreed between the owners and charterers. One form provided for arbitration in Paris; the other for arbitration in London. The bills of lading provided for the arbitration clause in an unidentified charterparty to be incorporated into the bills of lading.

[51] ***See page 299 of the report***

stands alone".[52]

79 Judge Diamond therefore dealt with the point more generally. He concluded that, as a matter of policy, a decision on the validity of an arbitration clause was not within the "arbitration exception".[53] He said that there were "*solid practical and policy reasons*" for holding that decisions as to the validity of an arbitration agreement fell within the Brussels Convention. The principal one he gives is that if the Brussels Convention does not apply then one decision by a Brussels Convention court will not be recognised by another. Thus successive and possibly contrary judgments on the validity of an arbitration agreement could be given.[54]

80 In my respectful view Judge Diamond's conclusion on the scope of ***Article 1(4)*** is contrary to the tenor of the decision of the ECJ in the ***Marc Rich case***, in particular paragraphs 18, 26 and 27 to 29. Paragraph 18 of the ECJ judgment gives clear guidance from the Court that "*arbitration in its entirety*" is excluded from the Brussels Convention. Nor do I read paragraph 28 of the judgment as indicating that if the only issue before the English court had been the validity of the arbitration agreement, it would have held that issue to be within the convention. Given the broad statement in paragraph 18 of the judgment, it must have followed that proceedings concerning the validity of an arbitration agreement would be outside the Convention. That conclusion is amply supported by the Schlosser Report quoted by Mr Advocate-General Darmon at paragraph 57 of his Opinion.[55] The ECJ in ***Marc Rich*** approved the reasoning of the Schlosser

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[52] ***See [1992] 1 Lloyd's Rep 624 at 628.***

[53] ***See page 300 of the report***

[54] ***See page 300-301 of the report***

[55] Mr Advocate-General Darmon refers to ***OJ 1979 C59 page 93.*** The relevant passage is quoted at ***para 70 (7)*** above.

Report. I note that in the later ECJ case of ***Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line***[56] the ECJ expressly referred to this particular passage in the Schlosser Report and approved it.[57] In the ***Van Uden case*** the Court also reiterated the conclusion that the Contracting Parties to the Brussels Convention "*intended to exclude arbitration in its entirety, including proceedings brought before national courts*".[58]

81 Further, Judge Diamond's reasoning on "*policy*" is quite contrary to the views of Mr Advocate-General Darmon, particularly those he expresses at paragraphs 76 and 77 of his Opinion. There he emphasises the point that harmonisation of judgments is not an end in itself. In matters concerning arbitration the courts of the "seat" of the arbitration should have primacy.

82 Therefore, with respect, I cannot agree with Judge Diamond's "*policy*" analysis. Nor can I agree with his conclusion that a judgment on the validity of an arbitration agreement is within the Brussels Convention and so is not caught by the "arbitration exception" in ***Article 1(4)***.

83 ***Qingdao Ocean Shipping Co v Grace Shipping Establishment (The "Xing Su Hai")***[59]

That case involved disputes between shipowners and a head charterer over payment of hire. The owners appointed an arbitrator. They then obtained from Gatehouse J (*ex parte*) a "world-wide *Mareva*" injunction and leave to serve proceedings out of the jurisdiction on the charterers and their principal director. The charterers, who were domiciled in Germany, applied to set aside the

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[56] ***[1998] ECR 7091***

[57] ***See paragraph 32 of the judgment***

[58] ***See paragraph 31 of the judgment, which refers back to para 18 of the Marc Rich judgment***

[59] ***[1995] 2 Lloyd's Rep 15***

proceedings and the injunction on the ground that the English Court had no jurisdiction over them. They argued that the Brussels Convention applied to the proceedings and so the charterers must be sued in Germany. The shipowners argued that the Brussels Convention did not apply because the proceedings fell within the "arbitration exception" in ***Article 1(4)***.

84 Rix J held that the "arbitration exception" did not apply. Having referred to the ***Marc Rich*** decision and ***the Heidberg case***, Rix J characterised how to resolve the issue of whether proceedings come within the Brussels Convention as follows:

> "*... the essential subject-matter of a dispute has to be categorised and... for the purpose of such categorisation a dispute is not to be casually categorised as relating to arbitration merely because what is really a question of construction relates to an arbitration clause*".

85 In my respectful view this approach accurately reflects that of the ECJ in paragraphs 18 and 27 to 29 of the ***Marc Rich case***. Rix J concluded that in the case before him, the "*essential subject-matter*" of the writ had nothing to do with arbitration. Therefore the "arbitration exception" in ***Article 1(4)*** did not apply.

86 ***Toepfer International GmbH v Molino Boschi SRL***[60]

Molino Boschi SRL were the ***c.i.f.*** buyers of soya bean meal from Toepfer under contracts incorporating the terms of the GAFTA 100 form. Molino Boschi pursued claims for short delivery and poor quality in the Ravenna courts. Then Toepfer applied by Originating Summons to the English court for: (i) a declaration that Molino were obliged to refer the disputes to arbitration; and (ii) an injunction to restrain Molino from continuing the Ravenna proceedings. Toepfer obtained leave to serve the English proceedings out of the jurisdiction on Molino. Molino applied to set aside or stay the English proceedings under

[60] ***[1996] 1 Lloyd's Rep 510***

Articles 21 and 22 of the Brussels Convention, on the ground that the Ravenna court was the court "first seised" of the proceedings.

87. It is not clear from the report of the judgment whether a point on ***Article 1(4)*** was specifically taken by Molino. But Mance J commented[61] on the question of whether the Brussels Convention applied to the declaration and injunction claims made in Toepfer's Originating Summons. He referred to the ***Marc Rich case*** and the ***Heidberg case***. He assumed, without comment, that the ***Heidberg case*** was correctly decided on the ***Article 1(4)*** issue. Mance J pointed out that a claim for a declaration that a party is obliged to arbitrate a matter might be more closely related to arbitration than a claim for an injunction requiring him to arbitrate and discontinue foreign proceedings.[62] He decided that he should proceed on the assumption that the Brussels Convention did apply to all the claims made by Toepfer in the Originating Summons. But, as I understand the report, he did not actually rule on the ***Article 1(4)*** issue.

88 I note carefully Mance J's comments on the difference between a claim for a declaration and for an injunction to restrain foreign proceedings and to pursue arbitration. However, apart from that, I respectfully conclude that the case does not provide much guidance on the scope of ***Article 1(4)***.

89 ***Lexmar Corporation and The Steamship Mutual Underwriting Association (Bermuda) Ltd v Nordisk Skibsrederforensig and Northern Tankers (Cyprus)***

[61] ***At pages 512-513 of the report***

[62] ***Page 513 of the report***

Ltd ("The Lexmar case")[63]

An arbitration dispute between Lexmar Corporation (the owners of the "***Vida I"***)and charterers, Norrthon Shipping Corporation of Liberia was compromised. It was agreed that Norrthon would pay Lexmar's costs of the arbitration. Those costs were then agreed. Norrthon's defence Club, Nordisk, had provided two Letters of Undertaking as security for Lexmar's costs in the arbitration. They contained an English law and jurisdiction clause.

90 Lexmar and its P&I Club, The Steamship Mutual,[64] began proceedings in the English court to recover the costs pursuant to the two Letters of Undertaking. Nordisk said that the matter should be dealt with in the course of elaborate proceedings that were already before the Norwegian courts; therefore the English court should stay the English proceedings under ***Article 22*** of the Lugano Convention. The first issue that the court had to consider was whether the English proceedings came within the Lugano Convention or were within the "arbitration exception" in ***Article 1(4)***.

91 Colman J referred to the ECJ's decision in ***Marc Rich***. He concluded that the substance of the ECJ's construction of ***Article 1(4)*** was that it encompassed matters relating to arbitration that were covered by international conventions on the recognition and enforcement of arbitration awards.[65] He noted that the New York Convention dealt also with powers of regulation and control of arbitrations. Therefore any judicial proceedings which were directed to the regulation or control of arbitration proceedings and awards must be covered by the "arbitration exception" in ***Article 1(4)***.

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[63] ***[1997] 1 Lloyd's Rep 289***

[64] They claimed to be subrogated to the rights of Lexmar to recover the costs

[65] ***See page 292 of the report***

92 However the "arbitration exception" did not include proceedings on a Letter of Undertaking to enforce a compromise agreement on costs relating to an arbitration. Those proceedings did not relate to the regulation or control of the arbitration proceedings at all.[66] I respectfully agree with this conclusion. Colman J's analysis of the ***Marc Rich*** decision does not appear to contradict anything that I have stated above.

93 ***Toepfer International GmbH v Societe Cargill France***[67]

Toepfer sold Cargill three parcels of soya bean meal on ***c.i.f.*** terms and subject to the provisions of the GAFTA 100 form. The terms also contained a ***Scott v Avery***[68] ***clause.*** Upon discharge Cargill became concerned about the condition of the cargo. They applied to the French Court to appoint an expert to ascertain the relevant facts concerning the cargo. The French Court appointed an expert. Cargill then appointed their GAFTA arbitrator and Toepfer subsequently appointed one as well. One year after Cargill had appointed their arbitrator they started substantive proceedings in the French court, claiming damages for breach of the ***c.i.f.*** sale contract. At the same time Cargill renewed their claim in the GAFTA arbitration. Toepfer then referred to GAFTA a claim for breach of the arbitration agreement by Cargill. Toepfer also served a defence in the French proceedings which was limited to a challenge to that court's jurisdiction.

94 Subsequently Toepfer issued proceedings in the English court for declarations that (i) the two disputes were within the arbitration agreement; (ii) Cargill were obliged to arbitrate the disputes; and (iii) Cargill were in breach of the arbitration agreement in bringing proceedings in France. Toepfer also sought an injunction

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[66] ***See pages 292-293 of the report***

[67] ***[1997] 2 Lloyd's Rep 98***

[68] ***(1856) 5 HLC 811***

to restrain Cargill pursuing the French proceedings. Cargill resisted these claims by asserting that they were the same as those being pursued in the French courts and the French court was the "first seised", so the English court should decline jurisdiction under ***Article 21*** of the Convention. Toepfer reposted by arguing that the disputes concerning the arbitration agreement were within the "arbitration exception" in ***Article 1(4)*** of the Brussels Convention.

95 Colman J considered the judgment of the ECJ in the ***Marc Rich case***. He referred to his own analysis of the ***Marc Rich case*** in ***the Lexmar case***. He characterised the conclusion of the ECJin ***Marc Rich*** as follows:

> "*The underlying function of art. 1(4) is thus to be taken as the exclusion from the jurisdictional regime of the Convention of such proceedings before domestic Courts as involve a subject-matter falling within the ambit of application of international conventions on arbitrations, such as the New York Convention*".

In ***Marc Rich*** the appointment of an arbitrator was within that subject-matter. So it fell within ***Article 1(4)***.

96 Colman J then characterised the subject-matter of the current proceedings in the English court as being "*whether the determination of the substantive dispute between the parties*[69] *should be by the French Court or by GAFTA arbitration*". He held that the nature of the subject matter of this dispute "*unquestionably*" fell within the scope of the New York Convention on arbitration. He concluded[70] that:

> "*It would thus be inconsistent with the principle underlying the European Court's judgment in* ***Marc Rich*** to hold that ***Article 1(4)*** *did not exclude this dispute from the application of the Brussels Convention"*.

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[69] That is the underlying dispute for alleged breach of contract in delivering sub-standard goods

[70] ***See page 103 of the report***

97 Colman J made two further comments on the cases. First he said that if the comments of Mance J in ***Toepfer International GmbH v Molino Boschi Srl***[71] were intended to suggest that the "arbitration exclusion" in ***Article 1(4)*** only extended to "*proceedings claiming remedies facilitating or regulating arbitrations as distinct from remedies enforcing arbitration agreements*", then he could not agree with that view. This was because the enforcement of agreements to arbitrate was within the scope of the New York Convention and the reasoning of the ***Marc Rich*** decision was that if proceedings came within the scope of that Convention then it was outside the Brussels Convention. I agree with this comment of Colman J.

98 Secondly Colman J referred to the comment of Neill LJ that was made when the ***Marc Rich case*** had been remitted to the English Courts and Marc Rich had claimed an injunction to prevent SII continuing the Italian proceedings. Neill LJ had stated (obiter) that the ECJ decision in ***Marc Rich*** had given:

> "*... no guidance on those cases where the challenge to the validity of the (arbitation) agreement constitutes that dispute and stands alone*".[72]

Colman J disagreed and (with respect) so do I, for the reasons that I have already given above when commenting on the ***Heidberg case***.

99 As I have already mentioned, when the case got to the Court of Appeal they decided to remit two issues to the ECJ. The first of the two questions posed was:

> "*Does the exception in **Article 1(4)** of the Brussels Convention extend to proceedings commenced before the English Courts seeking: (a) a declaration that the commencement and continuation of proceedings before a French Court constitutes a breach of an arbitration agreement; (b) an injunction restraining the appellants from continuing the proceedings before the French Court, or instituting any further*

[71] ***[1996] 1 Lloyd's Rep 510 at 512-513***

[72] ***[1992 1 Lloyd's Rep 624 at 628***

proceedings before any other court in breach of the arbitration agreement".

The first claim in that case is not identical with the claim made in this case. The former claim assumes that there is a valid arbitration agreement. However the second claim is effectively identical. But the case was settled before the ECJ could consider either point.

100 **Conclusions on whether the current claims come within the "arbitration exclusion" in *Article 1(4)* of the Brussels Convention**

I have concluded that the nature of the subject-matter of both the claims in the present case falls within the "arbitration exception" in ***Article 1(4)***.

(1) The first claim, for a declaration that there is a valid arbitration agreement between the parties, clearly concerns arbitration. That is the principal focus or "*essential subject-matter*"[73] of that claim. The tenor of the decision in ***Marc Rich***; the reports of Messrs Jenard and Schlosser and the decision of the ECJ in ***Van Uden case*** all lead me to the conclusion that the subject-matter of this claim is outside the scope of the Brussels Convention. Insofar as the decision of Judge Diamond QC in the ***Heidberg case*** takes the contrary view I respectfully disagree with it.

(2) The object of the claim for an "anti-suit" injunction (assuming the arbitration agreements are valid and binding) is to make the Defendants adhere to their contractual agreement to resolve disputes by arbitration in London by using the English Court's powers to grant injunctive relief. The principal focus or essential subject matter of that claim is therefore also arbitration, because the claim is for relief to enforce the arbitration agreement. If, as the ECJ has stated in both the ***Marc Rich case*** and the

[73] The phrase used by Rix J in ***The "Xing Su Hai"*** case at page 21

Van Uden case, "*the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts*",[74] by ***Article 1(4)*** of the Brussels Convention, then a claim for an injunction to enforce an arbitration agreement must, I think, come within ***Article 1(4)***.

101 Accordingly, the jurisdiction of the English Court is governed by ***CPR Part 6.20 (5) and/or paragraph 8.1*** of the ***Arbitration Practice Direction***. As I have already noted in paragraph 56 above, Mr McParland for the First to Fifth Defendants did not make any submissions to counter those of Mr Baker that (i) there is an arguable case that the London arbitration agreement bound the First to Fifth defendants; (ii) there is a serious issue to be tried on whether the Court should grant the declarations and the injunctive relief that the Claimants seek; and (iii) the English forum is the appropriate forum to determine those issues. Therefore subject to Mr McParland's argument on Issue Two the English Court must have jurisdiction. I must now deal with Issue Two.

The Second Issue: Should the English Court refuse in principle to grant an "anti-suit" injunction because it is so contrary to the whole scheme of the Brussels Convention and the Courts of Contracting States?

102 As I understood the argument of Mr McParland, this point arises even if I concluded that the claims of the Claimants were not subject to the Brussels Convention. The point he makes is that civil law systems do not have remedies such as "anti-suit" injunctions. He points out that the vast majority of the Contracting Parties to the Brussels Convention are civil law systems, whose approach to jurisdictional disputes is to leave it to the court where the first proceedings are started to decide whether or not it should exercise jurisdiction.

[74] ***The Van Uden case [1998] ECR 7091 at para 31***, referring back to the ***Marc Rich case at para 18***

He submitted that this should be the starting point of the English Courts.

103 Mr McParland referred me to two English cases in support of his submission that the English Court should hesitate before granting anti-suit injunctions against parties domiciled in Convention States. The first was ***Phillip Alexander Securities and Futures Limited v Bamberger & others***.[75] In that case the Claimant ("***PASF***"), which was a broking house, had disputes with various customers. They took proceedings in the German Courts. PASF started arbitrations in England in accordance with the arbitration clause in the standard form customer agreements. PASF applied to the English Court for a declaration that the arbitration agreements in the standard form customer agreements were valid and enforceable; that judgments obtained by customers in the German courts in breach of the arbitration agreements were not to be recognised by the English Courts; and an injunction to restrain the customers from continuing proceedings in Germany. Anti-suit injunctions were obtained by PASF against certain German customers pending a full hearing before Waller J. However there were problems in serving the orders of the English court as some German courts regarded them as an attack on the sovereignty of Germany and an interference in the German judicial process.

104 Waller J had to decide a large number of points. One was whether the German judgments had to be recognised under the Brussels Convention. If they concerned "arbitration" then the Convention would not apply, as they would be within ***Article 1(4)***. He inclined to the view that insofar as those judgments were dealing with the validity of the arbitration clauses they might well not be within the Convention; but in dealing with the substance of the disputes between the

[75] ***[1997] ILPr 73.*** This report contains the judgment of Waller J and also the Court of Appeal

parties the judgments were within the Convention.[76] His solution to the conundrum was to hold that even if a judgment of a court in a Convention state was within the Convention, the English court would not be obliged to recognise it if it was obtained in breach of a valid arbitration provision.[77]

105 However, whether or not the German proceedings and judgments came within the Brussels Convention, Waller J concluded that anti-suit injunctions were inappropriate.[78] One of the main reasons for this was that the German courts regarded the grant of an injunction as offensive and an interference.[79]

106 The Court of Appeal decided that none of the arbitration clauses in the customer contracts was enforceable. So there could be no question of an anti-suit injunction. But at the end of the judgment of the Court (given by Leggatt LJ), there were some general comments on the practice of the English Court to grant injunctions to restrain a party from continuing with proceedings in a foreign court. In particular Leggatt LJ stated:[80]

(1) the conventional view that such injunctions acted on the party concerned, rather than as an order to the foreign court, might lack reality when the defendant had no presence in England and the order of the English court had to be enforced through the foreign court;

(2) in future cases if the foreign court regarded the injunctions as an infringement on its sovereignty that might be very significant;

(3) in relation to European Union states the best way of dealing with this

[76] ***See in particular paragraphs 100 to 114***

[77] ***See paragraph 115***

[78] ***See paragraph 84***

[79] ***See paragraph 83***

[80] ***See paragraph 48 of the CA judgment***

problem might be the introduction of a Directive defining the extent of the recognition which the orders of the courts of Member States were entitled to receive from the courts of other Member States.

107 The second case on which Mr McParland relied was the ***Toepfer v Cargill case***[81] in the Court of Appeal. In that case the Court of Appeal dealt first with the question of whether, assuming it had jurisdiction,[82] it should grant an anti-suit injunction to restrain the French proceedings. The Court of Appeal held that as the arbitration clause was valid and the defendants were in breach of it, the English Court had jurisdiction to grant an anti-suit injunction. Furthermore Colman J had not erred in exercising his discretion in granting an injunction.[83]

108 The passage that Mr McParland particularly relied on is at ***page 386***. There Phillips LJ referred to the fact that under ***Article II.3 of the New York Convention on the Recognition and Enforcement of Arbitral Awards***, the courts of contracting states are bound to refer the parties to arbitration when an action is commenced in disregard of the clause. He continued:

> "*It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a defendant who was improperly sued in disregard of an arbitration agreement in the court of a country subject to the New York Convention were left to seek a stay of the proceedings in the Court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign courts to stay proceedings in accordance with the New York Convention, for it has become the habit to seek anti-suit injunctions such as that sought in the present case*".

109 Phillips LJ then quoted from the well-known passage of Millett LJ in ***The***

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[81] ***[1998] 1 Lloyd's Rep 379, particularly at 386 per Phillips LJ***

[82] The English Court would only have jurisdiction, of course, if the English proceedings were ***not*** subject to the Brussels Convention (by virtue of ***Article 1(4)***) and/or ***Article 21*** of the Convention was inapplicable.

[83] ***See page 386 of the report***

"Angelic Grace" at page 96.[84] In that passage Millett LJ said that the English Courts had no good reason for diffidence in granting an anti-suit injunction in cases when the defendant was in breach of his contractual agreement not to bring proceedings in other courts. Phillips LJ then continued:

> "*While we would not wish it to be thought that we have independently endorsed these sentiments, in view of this decision we feel obliged to hold that Colman J did not err in principle in the exercise of his discretion when granting an injunction in this case. The point will be open to argument in a higher tribunal*".

110 Mr McParland's point was that in each of ***The Angelic Grace, PASF v Bamberger*** and ***Toepfer v Cargill case*** the Court of Appeal was concerned with applications for anti - injunctions where a party had brought proceedings in a Brussels Convention country in breach of an arbitration clause. But in the latter two cases the Court of Appeal was much less enthusiastic about the exercise of this power than in ***The Angelic Grace case***. However I do not read the comments in Leggatt LJ (in ***the PASF case***) or Phillips LJ (in the ***Toepfer* case**) as amounting to any new principle. In my view it is clear from the Court of Appeal's decision in ***Continental Bank NA v Aeakos Compania Naviera SA***[85] that the English Court can exercise its jurisdiction to grant an anti-suit injunction to restrain foreign proceedings in a Brussels Convention state where they are in breach of a contractual obligation,[86] although there is always an element of discretion. Although Phillips LJ commented in the ***Toepfer case*** that the ***Continental Bank case*** had "*provoked widespread controversy*"[87] I am bound by

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[84] ***[1995] 1 Lloyd's Rep 87 at 96***

[85] ***[1994] 1 WLR 588***

[86] In that case the Greek proceedings were in breach of an English exclusive jurisdiction clause.

[87] ***See page 386 of the report***

the principles that it lays down. One of those must be that the English Court has jurisdiction to grant an anti-suit injunction to restrain proceedings that are taking place in the Court of a Brussels Convention country in breach of an agreement on the forum for dispute resolution.

Issue Three: Should the English Court grant an anti-suit injunction as a matter of discretion?

111 Mr McParland takes two principal points. These are:

(1) First, that the First to Fifth Defendants' actions in obtaining the appointment of a Court Expert is not a breach of the arbitration agreements. This is because (i) the proceedings for the appointment of an expert are not substantive proceedings; (ii) therefore those Defendants have not acted in repudiatory breach of the arbitration agreement; (iii) the actions of the Tenth Defendants in arresting the "***Stanko Staikov***" and instituting substantive proceedings in Marseille have nothing to do with the First to Fifth Defendants; (iv) there is no further evidence of any actual or threatened breach of the arbitration agreements to warrant the grant of an anti-suit injunction.

(2) Secondly, the French courts take the view that anti-suit injunctions of the kind sought here are a grossly offensive intrusion into their own functioning. The English Court must take this into account, following the ***PASF case***. In support of this submission Mr McParland relies on the evidence of Professor Bonassies, Honorary Professor of Marine Law at the University of Aix-Marseille, who is an experienced French maritime lawyer of international reputation. His view is referred to in paragraphs 45 and 46 of the first witness statement of Mr Kenyon. There Mr Kenyon states that Professor Bonassies' opinion is that a French Court's attitude

would be:

> "*that the imposition of an anti-suit injunction by an English court is a grossly offensive intrusion of its own functioning. This is particularly the case in international arbitration where French Courts have a long-standing adherence to the provisions of the 1958 New York Convention*".

113 **The Basic Test**

The Court of Appeal has recently confirmed the basic test that should be used by an English court when invited to grant an anti-suit injunction in cases where there is a valid exclusive jurisdiction clause.[88] Stuart-Smith LJ clearly regarded the same test as being applicable whether the contractual agreement on jurisdiction is an exclusive jurisdiction clause or an arbitration clause.[89] Thus once it is shown that there is a valid arbitration clause then the defendant has to show "*strong cause*" or "*strong reason*" why he should not be ordered to adhere to his contractual promise. One "*strong cause*" may well be that the English Court is not satisfied that there is an actual or threatened breach of the arbitration agreement by the defendant.

114 The Court maintains an overall discretion. There may be special factors in a particular case militating against the grant of an anti-suit injunction.

115 **Has there been an actual or threatened breach of the arbitration agreements in this case?**

(1) I am prepared to accept the submission that the original application to the Marseille Court did not constitute taking substantive proceedings by the First to Fifth Defendants. But at this "on notice" application to renew the anti-suit injunction I must be entitled to look at the actions of the First to

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[88] ***See Donohue v Armco [2000] 1 Lloyd's Rep 579 at 589 per Stuart-Smith LJ with whom Brooke and Sedley LJ agreed on this point: see pages 596 and 601***

[89] Hence Stuart-Smith LJ's reference to ***The Angelic Grace case at page 589***

Fifth Defendants and their representatives overall. I must consider whether those actions show that there has been an actual breach of the agreement to refer disputes under the Bill of Lading contracts to London arbitration, or a threatened breach that is serious.

(2) It is the actions and words of Mr Duron that are critical. The following facts concerning him and his actions are significant:

(a) He is an insurance broker and adviser to the Insurer Defendants as well as the First Defendant (the shipper).

(b) Mr Duron has made it clear since April 2000 that he did not favour London arbitration because of a previous "bad experience".[90]

(c) His reaction to the Shipowners' appointment of an arbitrator (on 19 May 2000) was to insist that this procedure did not concern the interested parties or their subrogated underwriters that he represented. He also stated that his clients maintained their request that the Marseille Tribunal be the agreed court.[91]

(d) After the anti-suit injunction had been obtained from Longmore J (without notice) Mr Duron's reaction was to say two things.[92] First that there were two proceedings in existence and the French proceedings were first in time. The implication was that the French court was seised of the matter and the English Court should decline jurisdiction. Secondly he said that the arbitration clause was not binding on the Bill of Lading holders and their underwriters. He concluded that "*for the reasons given here above, this claim must*

[90] Pierce (1) at para 12

[91] Fax of 22 May 2000 from Mr Duron to Mr Searle of the Club

[92] Fax of 24 May 2000 from Mr Duron to Mr Pierce of HFW

not go in arbitration in London". That shows a clear intention not to be bound by the arbitration agreements.

(e) His attitude to the anti-suit injunction granted by Longmore J was that it did not concern his clients.[93] He still insisted that security given by the Shipowners should nominate either the Marseille Tribunal or another court (as opposed to arbitration) as the "competent" court.

(f) I am prepared to accept that the Varna proceedings were begun mistakenly in the name of the Seventh Defendants (although it is said the proper claimants should have been the First Defendants). But I have to note that the Second Defendants are specifically identified in the application to the Varna court. That also says that Rustal "*and his underwriters*" intend to make claims against the carrier. As I have pointed out, the identity of the underwriters could only have come from either Mr Duron or SCP. So also must the erroneous (and disingenuous) statement that the application to the Marseille court for a Court surveyor was "*with a view to the preparation of the arbitration proceedings*".[94]

(g) I also cannot ignore the fact that SCP (the Marseille advocates for the First to Fifth Defendants) also act for the Tenth Defendants and it is the Tenth Defendant (Al Bitar Trading Est) that brought the arrest proceedings in the Marseille Tribunal.

(h) It is clear that the underwriters are behind the arrest proceedings. This is because: (i) Mr Bitar of Hilar Bitar & Sons sent a fax to the

[93] Fax of 5 June 2000 from Mr Duron to Mr Searle of the club

[94] See page 2 of the translation of the application: ***B/page 43***

Club on 30 June 2000 saying that security was needed so that Bitar's insurers could bring "*legal action they think necessary*"; (ii) Mr Bitar appeared unwilling initially to identify the receivers' underwriters; (iii) subsequently, on 18 July, he told the Shipowners' representative, Yordanka Boneva, that the receivers' insurance brokers were Mr Duron's firm, Groupe Eyssautier of Marseille and their underwriters were AXA.

(i) The Tenth Defendants have had to start substantive proceedings in the Marseille Tribunal as a condition of the validity of the arrest. As Mr Kenyon accepts in paragraph 55 of his first witness statement, the Tenth Defendants are "*the assured*" of his underwriter clients. Mr Duron, of course, is the broker and adviser of the underwriters.

(3) Accordingly I must conclude that the whole of the proceedings in France have been driven by the French underwriters and by Mr Duron in particular. It is clear that he intends to avoid London arbitration if at all possible. This has been the position since before the Claimants' application to Longmore J on 23 May 2000. It is telling that Mr Kenyon, who acts for the First to Fifth Defendants, has not stated in his witness statement that his clients are willing and able to pursue these disputes in arbitration. That is not surprising given the view of London arbitration expressed by Mr Duron, who is Mr Kenyon's direct client. There is thus, at the least, a clear threat by the shippers and Insurer Defendants to breach the arbitration agreements in the Bills of Lading and refuse to arbitrate in London the substance of the cargo disputes.

116 **Is there any other "*strong reason*" why an anti-suit injunction should not be granted? The attitude of the French Court as reported by Professor Bonassies.**

Mr McParland relies on two matters in particular. First he says that the fact that the Shipowners did not give any information about the explosion and cargo damage for 17 days indicates that they do not come to court for an injunction "with clean hands", so it should be refused as a matter of discretion. Secondly he says that the evidence of Professor Bonassies on the view of the French Court to the grant of anti-suit injunction is enough to weigh against granting an injunction.

117 I cannot place much weight on the first point. There is no evidence that the facts were deliberately concealed. The Vessel was in the middle of the Indian Ocean when the incident occurred. The cargo interests were able to appoint an English surveyor who could go to the Vessel upon her arrival at the first discharge port: Mersin.

118 The second point is more serious. However I note the precise terms of Mr Kenyon's witness statement, which record Professor Bonassies' own opinion. This is that:

> "*The imposition of an anti-suit injunction by an English Court is a grossly offensive intrusion of its [the French Court's] own functioning*"

I appreciate that Professor Bonassies' view accords with that of another French academic, Professor Helene Gaudumet-Tallon. But it does not record the actual opinion of French Judges; nor does he refer to any cases where those views have been expressed by French Judges. The absence of such views distinguishes this case from the position that faced Waller J in the ***PASF case***. In any event that case was unusual. All the customers were German; they were consumers; they had a constitutional right to have their consumer claim tried in a German Court

and the arbitration clauses were invalid under German consumer law. It is therefore not surprising that the German Courts took a dim view of the anti-suit injunction granted by the English Court.

119 In this case I would expect the French Court to take the view expressed by Millett LJ in the ***Angelic Grace case***,[95] that is:

> "*The Courts in countries [like Italy], which is a party to the Brussels and Lugano Conventions as well as the New York Convention, are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an exclusive jurisdiction or arbitration clause. I cannot accept the proposition that any court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline*".

120 Therefore, although I must be cautious, in view of the statements made by the Court of Appeal in both ***the PASF case*** and the ***Toepfer v Cargill case***, I have come to the conclusion that there is not a sufficiently "*strong reason*" why an injunction should not be granted against the First to Fifth Defendants.

SOMETHING MISSING HERE - no start to para. 121

of the Brussels Convention because they fall within the "arbitration exception" in ***Article 1(4)***, I do not need to consider the alternative arguments put forward by Mr Baker. I note, however, that in the Opinion of Mr Advocate-General Darmon in the ***Marc Rich case***[96] he states that the creation of a jurisdiction based on ***Article 5(1)*** (and ***Article 17***) "appears artificial and inappropriate". With respect I agree. That is all the more reason why arbitration in its entirety should be outside the scope of the Brussels Convention.

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[95] ***At page 96 of the report***

[96] At paragraph 94

CONCLUSIONS

122 I have concluded that:

(1) The claims made in the English proceedings for a declaration on the effectiveness of the arbitration agreements between the Shipowners and the First Defendants (and the subrogated Insurers who might claim through them) and an anti-suit injunction are both outside the scope of the ***Brussels Convention***. The "*essential subject-matter*" of those claims, or their principal focus, is within the "arbitration exception" of ***Article 1(4)*** of the Brussels Convention.

(2) Therefore the jurisdiction of the English Court to deal with the claims is governed by the ***CPR Part 6.20 (5)***. The First to Fifth Defendants accept that if that is the case, then the English Court has jurisdiction to entertain the claims and to grant permission to serve proceedings on those Defendants out of the jurisdiction.

(3) The fact that the First to Fifth Defendants are domiciled in Brussels Convention states is not a reason why, in principle, an injunction should not be ordered.

(4) There is substantial evidence that the First to Fifth Defendants intend not to be bound by the arbitration agreements in the Bills of Lading dated 5 April 2000. Their representative in France, Mr Duron, has clearly indicated in words and actions, that he regards himself as not bound at all by those agreements.

(5) There are no "*strong reasons*" why an injunction should not be granted to restrain the First to fifth Defendants from proceeding in France or elsewhere other than in London arbitration. In particular the fact that Professor Bonassies gives as his opinion that the French Courts would

regard an anti-suit injunction as a grossly offensive intrusion in their own functioning is not, on the facts of this case, a good reason for refusing the grant of an injunction.

123 There was some debate at the hearing on whether any injunction granted should be interlocutory or final. Mr Baker invited me to determine finally the existence of the arbitration agreement and dispose finally of the claim for an injunction. I have decided that the injunction should be interlocutory. I accept that it is unlikely that further contested facts concerning the First to Fifth Defendants' attitude to the London arbitration proceedings will emerge. However the grant of the injunction is dependent on the conclusion that there is an arguable case that the arbitration agreement is binding between the Claimants and the Defendants. Formally that issue has yet to be determined in a final way. It seems wrong to grant a final injunction when the basis for that relief has itself not been either conceded or finally determined. So for the present I will make the order interlocutory. I hope that Counsel will be able to agree a form of order. It may be that, subject to the issue of any possible appeal, the issue on the validity and effect of the Bills of Lading can be agreed between the parties without the need for a further hearing. If so, then the issue of whether the injunction should be final should also be capable of agreement.

124 I must thank both Mr Baker and Mr McParland for their full and interesting written and oral submissions. They were of immense help. In view of the importance of arbitration in London, I can only hope that the vexed question of whether proceedings before an English Court for anti-suit injunctions fall within the "arbitration exception" of ***Article 1(4)*** of the Brussels Convention will be authoritatively determined by a higher court soon.

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