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Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st April 2009

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

Case No: 2008 Folio 64

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
In the matter of the Arbitration Act 1996 and in the matter of an arbitration claim

Case No: 2008 Folio 667

Before :

MRS JUSTICE GLOSTER, DBE

- -

Between :

NATIONAL NAVIGATION CO	**Claimant**
- and -	
ENDESA GENERACION SA	**Defendant**

- -
- -

Ms. Vasanti Selvaratnam QC and Tom Whitehead Esq
(instructed by **Ince & Co**) for the **Claimant**
Richard Lord Esq, QC and Richard Blakeley Esq
(instructed by **Thomas Cooper**) for the **Defendant**

Hearing dates: 29th & 30th October 2008; 3rd November 2008
(further written submissions 4th-13th November 2008;
further written materials provided 17th December 2008;
further written submissions 12th-13th February 2009
further hearing date: 13 February 2009)

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE GLOSTER, DBE

Mrs Justice Gloster :

Factual background and procedural chronology

1. There are various applications before me in both the above actions. The first action, 2008 Folio 64, I shall refer to as "the Commercial Court Action" or "Folio 64"; the second, 2008 Folio 667, I shall refer to as "the Arbitration Action" or "Folio 667". In essence, the applications are a jurisdiction battle between the parties as to where, and by what means, their dispute should be resolved.

2. The Commercial Court Action was begun on 23 January 2008. The Arbitration Action was begun on 8 July 2008. In both actions, National Navigation Co ("NNC") is claimant, and Endesa Generacion SA ("Endesa") the defendant.

3. NNC, a company incorporated in Egypt, was, at all material times, the registered owner of the vessel "Wadi Sudr" ("the Vessel"). Endesa is, and was at all material times, an electrical generating company incorporated and carrying on its main business in Spain. It is therefore domiciled in Spain for the purposes of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Regulation").

4. By an exclusive supply agreement dated 27 December 2007 ("the Carboex Supply Agreement") between Endesa of the one part, and its co-subsidiary, Carboex SA ("Carboex"), of the other, Carboex agreed to supply and Endesa agreed to purchase coal for use by Endesa in its power plants, upon and subject to the terms and conditions set out in the agreement. The Carboex Supply Agreement governed all shipments of coal made by Carboex to Endesa from 1 January 2001. Its terms included the following, at clause 6:

> "Delivery by Carboex shall be made as CIF port of discharge, in accordance with the INCOTERMS. 2000, at a safe berth provided by Endesa …. The price of demurrage/dispatch shall be that indicated in the corresponding charterparty."

and at clause 9.1, the following:

> "… the CFR price shall be the result of adding the freight to the FOB price agreed by Carboex with the producer and with the shipowner respectively, together with the insurer of the Endesa group."

5. Pursuant to the terms of the Carboex Supply Agreement, on or about 14 December 2007, Endesa entered into an individual contract to purchase from Carboex a consignment of approximately 64,609 tonnes of sub-bituminous steam coal in bulk ("the coal"), to be delivered at Ferrol in Spain, where it was to be used in Endesa's generating facility there. The coal was shipped aboard the Vessel on 6 December 2007 in Indonesia, as evidenced by a bill of lading issued on that date ("the Bill of Lading"). The terms of the Bill of Lading included the following:

   i) it was in the CONGENBILL form, which expressly stated that the Bill of Lading was "to be used with charter-parties";

ii) the shipper was named as PT Adaro Indonesia;

iii) Endesa was named as the consignee;

iv) the named port of loading was "IBT Coal Terminal, Indonesia", and the named port of discharge was Ferrol, Spain;

v) the Bill provided: "… freight payable as per the relevant charterparty", but no date was given;

vi) the reverse of the Bill provided in standard form for the application of the Hague Rules, and in appropriate circumstances, the Hague-Visby Rules[1];

vii) the reverse of the Bill also stated, by Clause 1:

> "… all terms, liberties and exceptions of the Charterparty dated as overleaf, including the Law and Arbitration clause are herewith incorporated."

6. The evidence shows that the Vessel was subject to various potentially relevant charters. First, NNC chartered the Vessel to China National Chartering Corporation ("Sinochart"), pursuant to a time charter dated 1 October 2007 ("the Head Charter"). The Head Charter contained the following English law and London arbitration clauses:

> "**Clause 79 – Arbitration/Litigation**
>
> This Charter shall be subject to English Law. Any dispute or difference arising between Owners and the Charterers under this Charter shall be referred to three persons in London, one to be appointed by each of the parties hereto, and the third by the two so chosen, their decision or that of any two of them, shall be final and for the purpose of enforcing any award, may be made a rule of the court. The arbitrators shall be commercial shipping men conversant with shipping matters.
>
> The arbitrations shall be conducted under the Rules of the London Maritime Arbitrator's Association. Each of Owners and Charterers shall be entitled to consolidate proceedings involving related contract disputes with third parties arising from common questions of fact or law and/or to have such proceedings conduct[ed] concurrently with proceedings hereunder.
>
> Present Clause to be deemed fully incorporated into Bill(s) of Lading."

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[1] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by protocols in 1968 and 1979. This judgment does not address whether the Hague-Visby rules apply in the instant case.

Second, Sinochart sub-timechartered the Vessel to Morgan Stanley Capital Group Inc ("Morgan Stanley"), but neither party had a copy of this Charterparty, and it was not in evidence. Third, Morgan Stanley chartered the Vessel to Carboex under the terms of a voyage charter dated 25 September 2007 ("the Voyage Charter"). The Voyage Charter contained the following London arbitration clause:

> "5. If any dispute or difference should arise under this Charter same to be referred to three parties in the city of ~~New York~~ London. One to be appointed by each of the parties herein, the third by the two so chosen and their decision, or that of any two of them shall, be final and binding and this agreement may, for enforcing the same, be made a rule of court. Said three parties to be commercial men and members of the LMAA."

7. On or about 1 January 2008, the Vessel sustained damage to her rudder and general average was declared soon thereafter. The cause of the damage, and whether or not it resulted from a breach of the contract of carriage is in dispute, but the underlying merits of that dispute are not relevant for present purposes. Soon after the damage occurred, it became clear that the coal would not, or could not, be discharged at the contractual port of discharge under the Bill of Lading (namely, Ferrol). In fact, it was discharged short of destination at Carboneras in south-east Spain, on or about 30 January 2008.

8. Endesa contends that, because of the difficulties in transporting the coal from Carboneras to Ferrol, Endesa was forced to purchase a second shipment of coal for its plant at Ferrol, and incurred substantial cost in doing so. Endesa contends that NNC is liable for this additional cost.

9. By 18 January 2008 Ince & Co, solicitors, ("Inces") had been instructed on behalf of NNC and on that date, Stephen Askins, the partner in Inces having conduct of the matter, sent an email to various people asking if he could have a copy of the Voyage Charter. On 20 January 2008 he sent a follow-up email, but no copy of the Voyage Charter was forthcoming. By this time it was clear to him that Endesa intended to rely upon non-delivery at Ferrol to ground a claim in damages against NNC. By 22 January 2008, Mr. Askins had had a telephone conversation with Juan Alegre, a partner in Thomas Cooper, solicitors, who, according to Mr. Alegre (although this is not necessarily accepted by Mr. Askins) was at that time only acting for Carboex, but who came also to act, in this country, for Endesa. It is not disputed that, in the course of that telephone conversation, Mr. Alegre informed Mr. Askins that:

> "… the Voyage Charter has an English Law and Arbitration clause in the contract",

although he maintained the position that he was not prepared to allow NNC to have a copy of the Voyage Charter.

10. Around this date, it was also clear to Mr. Askins, from discussions with Endesa's Spanish lawyers and cargo underwriters regarding security for Endesa's claims against the Vessel, that there was a risk that Endesa would seek to invoke the jurisdiction of the Spanish court to determine the substantive merits of its claim

against NNC. Mr. Askins was alive to this possibility because the draft letter of undertaking (to be signed by NNC's insurers) proffered on behalf of Endesa and cargo underwriters provided for Spanish law and the exclusive jurisdiction of the Spanish courts. In the event, however, the security actually proffered to secure the release of the Vessel was framed to respond to a judgment on order of a competent court or tribunal in any jurisdiction.

11. On the morning of 23 January 2008, Endesa made an application to the Mercantile (First Instance) Court in Almería, Spain ("the Almería Court") for the arrest of the Vessel, as guarantee for its claim in relation to expense suffered as a result of the discharge of the coal at Carboneras ("the Spanish claim"). This application was made under the 1952 Convention for the Unification of certain rules relating to the arrest of seagoing Ships ("the Arrest Convention"). It was heard, *ex parte*, and the order was granted on 25 January 2008, and the ship duly arrested that day. The order required Endesa to file its main claim within 30 days.

12. On the afternoon of 23 January 2008, Mr. Askins, who (it is common ground) was not at that time aware of the application made that morning in the Almería Court, caused the claim form in the Commercial Court Action to be issued in the Commercial Court, with NNC as claimant and Endesa as defendant. After reciting the terms of the contract of carriage as contained in the Bill of Lading, and the facts relating to the discharge, the brief details of claim endorsed on the claim form stated as follows:

> "The Defendants have indicated that they will present a claim against the Claimants for damages said to arise as a result of the cargo being discharged at Carboneras rather than Ferrol. The Claimants deny being liable to the Defendants whether for breach of contract of carriage and/or duty and/or in negligence.
>
> The bill of lading incorporated the terms of a voyage charterparty pursuant to which English law governs the contract of carriage and this court has jurisdiction.
>
> The Claimants' claim is for a declaration that they are under no liability to the Defendants.
>
> I state that the High Court of England and Wales has power under [the Regulation] (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) to hear this claim and that no proceedings are pending between the parties in Scotland, Northern Ireland or any other Regulation State as defined by section 1(3) of the Civil and Jurisdiction and Judgments Act 1982."

The statement of truth was signed by Mr. Askins on behalf of NNC.

13. If the statement endorsed on the claim form as to the English court's power to hear the claim under the Regulation was correct, no leave to serve the claim form out of the jurisdiction was necessary. If it was not correct, then leave to serve the claim out of the jurisdiction under CPR Part 6 would have been necessary.

14. On 24 January 2008, Inces informed Endesa that the Commercial Court Action had been issued, attaching a copy of the claim form and stating that "… the High Court is now first seized and will determine whether it has jurisdiction in this matter".

15. On 22 February 2008, Endesa served its substantive claim in the Spanish Action, as required by the Almería Court. On 14 March 2008, the claim form in the Commercial Court Action was served on Endesa in Spain. On 19 March 2008, NNC lodged submissions with the Almería Court challenging its jurisdiction. These submissions made a number of points. The first reference to the grounds for the jurisdictional challenge to the Almería Court was that:

> "… the Spanish Courts do not have jurisdiction to hear the question subject matter [sic] of the aforementioned case, because it should be heard by 'los tribunales de Londres'."

Whether the reference to "tribunales" was intended to be a reference to the High Court or to a London arbitral tribunal is not clear. The grounds then refer to the fact that the charterparty

> "under which the Bill of Lading was issues which governs the relationship between [Endesa] and [NNC] was issued expressly establishes the jurisdiction of 'los tribunales de Londres' and English law as the law applicable to any dispute between the parties."

and goes on to state:

> "Taking this into account [NNC] initiated proceedings in the High Court of London [sic] on 23 January 2008 … to seek the declaration of the absence of liability." [emphasis supplied]

The grounds went to state that the Commercial Court Action dealt with the same subject matter and the same cause, although no reference was made to the Regulation. The grounds then concluded:

> "… from all that has been said, since it is not Spanish law, but English law, that applies, the Bill of Lading that governs the relationship with the Claimant and the Defendant, according to which the arbitration clause is absolutely valid … the Court must declare itself not to have jurisdiction to hear the disputes arising from the Bill of Lading furnished by the Claimant as Document 3 of the claim in favour of arbitration in London … I hereby petition the Court on the grounds the Court does not have jurisdiction because the question is subject to arbitration in London …" [emphasis added]

16. Endesa responded to this plea in the Almería Court with submissions dated 30 April 2008 contending that:

i) NNC had not disclosed a charterparty incorporated into the bill of lading incorporating a London arbitration clause;

ii) no arbitration clause was incorporated in the Bill of Lading, in particular, because under Spanish law the fact that NNC and Endesa were not direct counterparties to a charterparty containing a London arbitration clause meant that the requirements for conclusion of a binding arbitration agreement between Endesa and NNC were not satisfied; and

iii) in any event that NNC had waived any right to rely on an arbitration agreement by commencing the Commercial Court Action in London, and thereby repudiating any arbitration agreement; and

iv) that the Almería Court was first seised under the Regulation.

17. Thereafter the parties awaited judgment from the Almería Court

18. The Commercial Court Action had meanwhile been served on Endesa. On 14 April 2008, Endesa filed an acknowledgement of service, giving notice of its intention to dispute jurisdiction in accordance with CPR Part 58(7). On 12 May 2008 Endesa issued its application to challenge the jurisdiction of this court in the Commercial Court Action, supported by Mr. Alegre's first witness statement ("Endesa's Jurisdiction Application").

19. By a further application in the Spanish proceedings, dated 2 June 2008, NNC sought a stay of those proceedings on the further grounds that, because of the issue of the Commercial Court Action on 23 January 2008, prior to the filing of Endesa's substantive claim in the Spanish proceedings on 22 February 2008, the English court was first seised of the matter, pursuant to Article 27 of the Regulation. This application did not, however, refer to Article 5(1) of the Regulation, nor suggest that it was the basis of this court's jurisdiction under the Regulation.

20. On 9 June NNC started arbitration proceedings in London but against the time charterers under the Head Charter (apparently in order to obtain a copy of the Voyage Charter from them). This followed various requests by Mr. Askins for copies of the Voyage Charter from Morgan Stanley, Carboex and Endesa, which had not resulted in any copy being provided.

21. On 10 June 2008 NNC issued its application in the Commercial Court Action for disclosure of the Voyage Charter ("NNC's Disclosure Application"), supported by the first witness statement of Mr. Askins. In that statement Mr. Askins asserted that the Almería Court only became seised of the matter within the meaning of the Regulation at the time that the substantive claim was lodged by Endesa on 22 February 2008. It was thus common ground that the Spanish proceedings (at least to a limited extent – as to which, see below) fell within the Regulation. In his first witness statement, Mr. Askins sought an order for disclosure of the Voyage Charter together with an order extending the time within which NNC was to file and serve evidence in opposition to Endesa's Jurisdiction Application. He explained that the difficulties which he had experienced in obtaining a copy of the Voyage Charter meant that NNC was not in a position to deploy its arguments on the jurisdiction challenge.

22. It is necessary for the purposes of certain of Endesa's submissions in relation to the Commercial Court Action to quote passages from Mr. Askins' first witness statement:

"6. By way of explanation for what follows, if the voyage charter provides for English law and for this Court to have jurisdiction, the Owners will seek an order dismissing the Receivers' [i.e. Endesa's] application forthwith.

7. If on the other hand the voyage charter provides for English law and London arbitration, Owners' present intentions are to seek permission to amend the Claim Form [in the Commercial Court Action] so as to seek the following relief:

(1) A declaration that the London arbitration clause in the said voyage charterparty is binding upon the Receivers;

(2) Alternatively, a declaration that –

i the London arbitration clause referred to above is validly incorporated into the bill of lading identified herein; and

ii that the London arbitration clause referred to above is binding upon the Receivers;

(3) A stay in favour of the London arbitration;

(4) An interim (and subsequently a final injunction) pursuant to s.37(1) of the Supreme Court Act 1981 (and/or under s.44(1) and/or (2)(e) of the Arbitration Act 1996) to restrain the Receivers from proceeding with claims arising out of the said charterparty and/or Bill of Lading in any other forum or jurisdiction other than London arbitration as provided for under the said London arbitration clause; and

(5) To the extant [sic] necessary, permission to serve the Claim Form, this witness statement, any Order of this Court, and all other documents in this action, out of the jurisdiction on the Receivers care of their London solicitors Thomas Cooper.

(8) Self-evidently the intimated applications set out above depend entirely upon the terms of the voyage charter, and the precise nature of the arguments which the Owners will wish to take in this action are fully reserved pending disclosure of the same. What

follows should therefore be seen as explaining why the Owners seek disclosure from Receivers of the voyage charter at this stage of the proceedings. Only once disclosure is obtained will the Owners be in a position to fully respond to the Receivers' application."

23. Mr. Askins then went on to explain his difficulties in obtaining copies of the Voyage Charter. At paragraphs 22 – 32 he said:

> "22. In seeking to reach an agreement on the question of discharging at Carboneras I had discussions with, amongst others, Mr. Alegre[2]. In particular he informed me that the voyage charter provided for English law and arbitration. I refer to my email dated 13:00hrs 22 January 2008 … in which I stated as follows:
>
> 'For the avoidance of doubt owners have agreed to discharge the cargo at Carboneras and for this to be regarded as the port of final discharge. We would be grateful for confirmation that this will happen as soon as a berth becomes available.
>
> This is subject to the GA security (bond, average guarantee) being put up before discharge.
>
> On security the Club has agreed in principle to put up security for the Euro 2m sought subject to the final wording and agreement on jurisdiction. It would be helpful if some kind of breakdown could be provided particularly in circumstances where it is not obvious that there has been a breach of contract.
>
> I note that at the moment you are not minded to do that. **Mr. Alegre has confirmed to me that the voyage charter has an English Law and arbitration clause in the contract**. The bill is a Gencon 1994 bill and therefore this is incorporated into the contract of carriage. The agreed jurisdiction is therefore London and the LOU should be subject to London arbitration and/or competent court. Please confirm that this is in order. Owners reserve their rights on this issue (my emphasis)'
>
> 23. This email was sent to the following recipients, none of whom sought to challenge its contents at that (or any other) time (save as per paragraph 44 below):

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[2] The partner at Thomas Cooper dealing with both actions on behalf of Endesa, but who informed Mr. Askins that in January 2008 he was acting for Carboex.

(1) Eduardo Albors, a Spanish lawyer acting on behalf of Endesa;

(2) Juan Alegre;

… [various other recipients were named].

24. Shortly after this email was sent I had a conversation with Mr. Albors who informed me that he did not have a copy of the voyage charter. I therefore requested a copy from Juan Alegre and Michael Parker, by email dated 15:38hrs 22 January 2008 ….

25. Mr. Parker replied at 17:10hrs that day … and informed me that 'the voyage charterers Messrs Carboex have advised that they do not wish this c/p to be released to third parties'.

26. By now I was increasingly concerned that jurisdiction would prove to be contentious because of the discussions which had been taken place regarding security for the Receivers' claims against the Vessel. The Receivers had proposed a form of security which would have provided for Spanish law and jurisdiction, which proposal was made on 21 January 2008 …. The Owners did not want to consent to Spanish law and jurisdiction.

27. In view of the proposed security wording, I was alive to the possibility that the Receivers would seek to invoke the jurisdiction of the Spanish courts.

28. My difficulty so far as protecting the Owners' position was concerned was that I had yet to receive a copy of the voyage charter. Although it appeared to be accepted that the voyage charter contained a choice of English law and arbitration, I did not have any proof of this fact in writing such as would enable me to say with certainty that the Bill of Lading was not only subject to English law, but also incorporated a voyage charter containing an arbitration clause.

29. In an effort to prevent the Spanish Courts from being able to take jurisdiction in this matter, I therefore caused a Claim Form to be issued out of the Commercial Court Registry on 23 January 2008 on behalf of the Owners seeking 'a declaration that they are under no liability to the Defendants' ….

30. I personally signed the statement of truth.

31. In view of my conversation with Mr. Alegre in which I understood him to confirm the voyage charter contained a choice of English law and London arbitration, it may be asked why I chose to proceed in this Court rather than by way of arbitration. My decision was based on the following:

(1) Firstly, the existence of the voyage charter was not in issue;

(2) Secondly, nobody had challenged the suggestion that the voyage charter was governed by English law and I was confident that the Conditions of Carriage on the reverse of the Congen bill would have validly incorporated the choice of English law into the Bill of Lading;

(3) Thirdly, I believe that at common law a choice of English law as the law governing a contract is a factor which will entitle the English courts to take jurisdiction by permitting service out of the jurisdiction: CPR 6.20(5)(c);

(4) Fourthly, I had been informed by another coal trader that Carboex and/or the Receivers were known in the market to insist upon English law and jurisdiction;

(5) Fifthly, I suspected (correctly) that Receivers would seek to invoke the jurisdiction of the Spanish Courts;

(6) Sixthly, I was concerned that if first seised, the Spanish Courts might not accept that the Bill of Lading validly incorporated the voyage charter (which of course I had not seen) so as to be binding upon the Receivers;

(7) Seventhly, as the voyage charter seemed likely to be governed by English law, it seemed reasonable to assume that it might also provide for the English High Court to have jurisdiction;

(8) Eighthly, as I had no proof of the existence of any arbitration agreement binding upon the Receivers I was concerned that if I commenced arbitration and the charter in fact provided for High Court jurisdiction, there was a real risk that the Receivers would have

> invoked the jurisdiction of the Spanish Courts by the time by error came to light and my clients would be forced into a jurisdictional battle before the Spanish Courts, when there was no guarantee that the Spanish Court would adopt the same approach to the incorporation of jurisdiction agreements into bills of lading as would be adopted under English law. If the English Court was first seised, under [the Regulation] a Spanish Court would have to defer to a ruling on jurisdiction from the English Court;
>
> (9) Finally, I believed that ***if*** the voyage charter did in fact provide for London arbitration, this Court would in any event have jurisdiction because it would have jurisdiction:
>
> i To restrain Receivers from proceedings in Spain in breach of the arbitration agreement, by way of an anti-suit injunction; and
>
> ii To order a stay of the substantive proceedings in this action in favour of arbitration pursuant to s.9 of the Arbitration Act 1996."

32. It followed that so far as I was concerned the Owners were entitled to invoke the jurisdiction of the English Courts and for this reason I felt able to sign the statement of truth on the Claim Form under the assertion that 'The bill of lading incorporated the terms of a voyage charterparty pursuant to which English law governs the contract of carriage and this Court has jurisdiction."

24. Mr. Askins then went on to say as follows:

> "62. If the charterparty incorporated into the Bill of Lading provides for English law and jurisdiction to be taken by the English Court, I believe that the position will be as follows:
>
> (1) Article 23 of [the Regulation] provides as follows:
>
> 'If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in

> connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing; or
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'
>
> (2) The Receivers are domiciled in a Member State, Spain;
>
> (3) The agreement will be contained in or evidenced by writing and/or in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned, namely the Bill of Lading and voyage charterparty;
>
> (4) Accordingly, the parties will have given this Court exclusive jurisdiction to determine the subject-matter of their dispute."
>
> 63. In these circumstances, the only issue will be whether or not the English Court was seised before the Spanish Court.
>
> (1) If yes, I believe there are no grounds on which this action should be stayed;
>
> (2) In no, I believe it may be appropriate for the claim to be stayed pending determination of the jurisdictional challenge of the Owners to the Spanish proceedings in the Spanish Courts."

25. Mr. Askins then went on to contend that, in the circumstances, under Article 30 of the Regulation the English court was first seised, notwithstanding the application for

arrest of the Vessel made to the Almería Court, earlier in the day; under Spanish law, a distinction had to be drawn between arrest proceedings and the institution of substantive proceedings, the latter only occurring on 20 February 2008.

26. He then continued, at paragraphs 73 – 75 and 78 – 79, as follows:

> "73. If the charterparty incorporated into the Bill of Lading provides for English law and London arbitration, the Owners will commence arbitration and I believe the position will likely be as follows:
>
> (1) The form of wording on the Congen bill will likely be wide enough to incorporate the charterparty arbitration clause into the Bill of Lading: *The Delos* [2001] 1 Lloyd's Rep 703;
>
> (2) The question of this (or any other) Court's jurisdiction will be outside the scope of [the Regulation]: *Marc Rich* [1991] ECR I-3855;
>
> (3) The scope of the arbitration agreement will likely extend to a claim for a negative declaration;
>
> (4) The Spanish proceedings will likely be in breach of the arbitration agreement; and
>
> (5) This Court will therefore have jurisdiction to –
>
> i Declare that there is a binding arbitration agreement between the parties; and
>
> ii Grant an anti-suit injunction ordering the Receivers to take no further steps in the Spanish proceedings."
>
> 74. I repeat my previous submission that the Receivers' attitude to date has been strikingly unhelpful and has served only to inflate costs all round.
>
> …
>
> 78. I have already explained why notwithstanding Mr. Alegre's admission to me that the voyage charter provided for English law and arbitration that I caused the Claim Form for this action to be issued. That decision was taken as a matter of urgency in order to get the English Court seised before the Receivers were able to seise the Spanish Courts of this matter and so as to best protect the Onwer's [sic] position. It may be that once the voyage charter is disclosed hindsight will

> suggest that both parties were hasty: the Receivers because they were in breach of a clause incorporated from the voyage charter into the Bill of Lading which provided for High Court jurisdiction alternatively London arbitration, the Owners because they were acting (unbeknownst to them) in breach of a London arbitration clause incorporated from the voyage charter into the Bill of Lading.
>
> 79. Be that as it may, the voyage charter is clearly a document which the Receivers must disclose in the context of this application."

27. Following a refusal by Endesa to agree a consensual stay of the Commercial Court action in favour of London arbitration, on 3 July NNC commenced arbitration in London against Endesa under the Bill of Lading, and provisionally appointed Michael Baker-Harber as its arbitrator.

28. On 8 July 2008 NNC issued the arbitration claim form in the Arbitration Action, seeking various relief including permission to serve the claim form on Endesa by means of service upon Thomas Cooper within the jurisdiction and, specifically:

    i) disclosure of the Voyage Charter;

    ii) a declaration that the London arbitration clause in the Voyage Charter was validly incorporated into the Bill of Lading;

    iii) an injunction to restrain Endesa from proceeding with claims arising out of the Bill of Lading other than by way of London arbitration, as provided for under the said clause.

    The claim form also stated that:

> "These remedies are claimed in the alternative to the relief claimed [in the Commercial Court Action]."

29. On 11 July NNC served further evidence in the Commercial Court Action, namely Mr. Askins' second witness statement, which exhibited Spanish law evidence to support NNC's contention that the English court was first seised under Article 30 of the Regulation, and that the Spanish court was not seised until Endesa's substantive claim was submitted to the Almería Court on 22 February 2008.

30. On 15 July 2008, Flaux J made an order permitting service of the Arbitration Action claim form out of the jurisdiction on Endesa in Spain, but refusing to permit NNC to do so by way of Thomas Cooper, or to abridge time limits. On 17 July 2008, Andrew Smith J made an order that Endesa's jurisdictional challenge and NNC's application for specific disclosure in Folio 64 should be heard together. As a result, on 31 July 2008, Flaux J varied his original order and permitted NNC to serve Endesa with the Arbitration Action claim form by service on Thomas Cooper, and abridged time limits.

31. In July and August there was correspondence between the parties in the course of which NNC raised the question whether Endesa would be willing to give certain undertakings in relation to not prosecuting the Spanish action and agreeing a consensual stay. On 7 August 2008, NNC gave an indication that it might seek an anti-suit injunction if no such agreement was forthcoming. Endesa's attitude was that there was nothing at that stage to be done by way of prosecution of the action, the submissions on jurisdiction having been completed and the judgment being awaited. On 7 August 2008, this court listed the hearing of the applications in Folio 64 for 29 October 2008.

32. The judgment of the Almería Court was dated 31 July 2008 although it was not, in fact, delivered until 8 September 2008. However, on the evening of 4 September 2008, NNC gave notice to Endesa that it would be seeking an urgent anti-suit injunction from this court on the following day, effectively to compel Endesa to agree to a stay of the Spanish proceedings to prevent the Almería Court from giving judgment on the NNC application. At the hearing before HHJ Mackie QC, on 5 September 2008, Endesa submitted, amongst other things, that the mode of application was abuse of the process of court reserved for genuinely urgent cases and that, if any such application was to be made, it should be made on proper notice as it could, and should, have been made months earlier. This submission was accepted by the Court, and the application was adjourned for a week. After the Spanish court judgment was handed down on 8 September NNC's, application was further adjourned to 29 October.

33. In its judgment dated 31 July 2008, the Almería Court rejected NNC's jurisdiction challenge. In essence the Almería Court concluded that:

    i) no arbitration clause was agreed or incorporated from any charterparty into the Bill of Lading because the requirements for such agreement/incorporation under Spanish law had not been satisfied; in particular, Spanish law required the arbitration agreement and the choice of law agreement to be either expressly stated in the contract between the parties, or referenced in that contract and set out in "other documents that directly bound the parties";

    ii) in any event, by commencing the Commercial Court action NNC had waived the right to arbitrate the dispute under the alleged arbitration agreement and to challenge the jurisdiction of the Spanish court on the grounds that the dispute was referable to arbitration.

34. However, although it rejected NNC's jurisdictional challenge, the Almería Court acceded to NNC's application dated 2 June 2008 that the Spanish proceedings should be stayed until this court had decided whether it was competent to hear the Commercial Court Action – in other words, whether this court accepted jurisdiction in that action. Accordingly the Almería Court stayed the Spanish proceedings "on the basis of International-related *lis pendens*"; pursuant to Article 27 of the Regulation, as set out in its ruling dated 3 December 2008.

35. Endesa subsequently appealed the decision of the Almería Court to stay the Spanish proceedings pending the determination of this court. Endesa originally instituted this appeal by way of "reposición", that is to say by applying to the same first-instance court (the Almería Mercantile Court) to review its decision. On 16 September 2008,

the Almería Court ruled that this appeal should have been made by way of "apelación", that is to say, by appeal to a higher court. Endesa accordingly submitted an appeal by way of "apelación" to the Audencia Provincial de Almería (the Court of Appeal of Almería) on 16 October 2008. NNC submitted its defence to the appeal of Endesa on 5 December 2008. These proceedings are currently stayed pending this Court's determination.

36. On 30 September 2008, NNC submitted an appeal by way of "reposición" to the Almería Court, inviting it to review its decision refusing to reject jurisdiction because of the existence of the arbitration agreement.

37. On 2 October 2008, NNC obtained a copy of the Voyage Charter from Carboex, following an earlier ruling, on 17 July 2008, by Andrew Smith J that NNC's application for disclosure of the Voyage Charter and Endesa's application challenging the jurisdiction of the English court were to be listed and heard together, and that Endesa was to bring to court copies of the Voyage Charter so that they could immediately be produced if so ordered by the court. However, Carboex insisted upon, and obtained, an undertaking from NNC that it could only use the Voyage Charter in connection with the English proceedings between NNC and Endesa, and that once those proceedings were concluded, all copies would be destroyed.

Subsequent proposed amendment of the Arbitration Action claim form

38. In his fifth witness statement, dated 16 October 2008, served shortly before the hearing, Mr. Askins sought permission on behalf of NNC to amend the Arbitration Action claim form to rely in the alternative on the English law and arbitration clause in the Head Charter.

Subsequent proposed reliance on Article 5 of the Regulation in the Commercial Court Action

39. In the same witness statement Mr. Askins also raised, for the first time, NNC's intention to rely, in the alternative, in the Commercial Court Action, on Article 5(1) of the Regulation to support an argument that this court had jurisdiction to grant a declaration as to the existence of a binding London arbitration agreement, and issue an injunction in support of London arbitration. This was on the grounds that the contract to arbitrate was a contract to which Article 5 applied and London was the place of performance of the obligation in question. He further submitted that such a claim could properly be advanced in the Commercial Court Action notwithstanding that no reference was made to such a claim in the existing claim form. He contended that the claim could be made in the Particulars of Claim (which had not yet been served because of Endesa's jurisdictional challenge), and that no amendment was necessary because, under CPR Part 16.2(5) it was provided that:

> "The court may grant any remedy to which the claimant is entitled even if that remedy is not specified on the claim form."

40. The draft Particulars of Claim in the Commercial Court Action, dated 16 October and exhibited to the witness statement, thus sought declarations that: the London arbitration clause (either under the Head Charter or the Voyage Charter) was incorporated in the Bill of Lading; damages for breach of the London arbitration

clause; a declaration that this court had jurisdiction pursuant to Article 5; a declaration that NNC had no liability in respect of any claim which Endesa might bring in breach of the arbitration clause; and an anti-suit injunction.

Post-hearing application for disclosure of the Voyage Charter

41. On 4 November 2008, by letter of the same date, and immediately following the hearing of the applications before me (on 29 and 30 October, and 3 November 2008), a further application was made by NNC on what were stated to be urgent grounds for disclosure of the Voyage Charter. In response to a question from the court during the hearing as to whether the Carboex Supply Agreement (which at that time was only exhibited in its original Spanish) contained any material provisions, NNC had, for the first time, after the hearing, obtained an English translation of the Carboex Supply Agreement and invoice. In its letter dated 4 November 2008, NNC drew the court's attention to Clause 6 of the Agreement, including the terms that "… the price of demurrage/dispatch shall be that indicated in the corresponding charterparty". NNC contended that these provisions supported the submissions:

> "… already made by Owners at the hearing (a) that Endesa must have been aware of the content of the [Voyage] charter, including the London arbitration clause, at all material times (contrary to the submissions made by Endesa to the Spanish court) and 9b) that the [Voyage] charter is within Endesa's control for the purposes of CPR Part 31.
>
> We therefore ask the court to make an order against Endesa for production of a copy of the [Voyage] charter forthwith, with liberty to show the same to the Spanish court to correct the false impression which has been given by Endesa in its submissions to the Spanish court regarding the absence of any document containing a London arbitration clause (C pages 218 and 219.
>
> We respectfully ask for this order to be made as soon as possible (with reasons to follow) given that a decision on the *recurso* challenge is expected within the near future. We are not sure whether it will be possible to introduce the [Voyage] charter as part of the *recurso* appeal as submissions are now technically closed. In this regard, it would greatly assist if the Court, as part of its disclosure order, required Endesa to consent to the admission (or at least not to oppose the admission) of the [Voyage] charter to the Spanish court dealing with the current appeals before judgment is given."

42. By a direction dated 5 November, I gave leave to the parties to submit evidence whether:

> "… as a matter of Spanish law, Endesa has the right, under the [Carboex Supply Agreement], to require Carboex to supply Endesa with a copy of the 'corresponding charterparty' referred to in clause 6 of the [Carboex Supply Agreement]"

43. Following the receipt of such evidence, and further lengthy submissions from the parties, on 21 November 2008, I made an order in the following terms:

> "1. the defendant do disclose to the claimant a copy of the [Voyage Charter] …., and the claimant be at liberty, so far as this court is concerned, to use such copy for the purposes of the Spanish proceedings …… but without prejudice to any such order as the Spanish court may make in that regard;
>
> 2. the claimant's application for an order that the defendant be required by this court to consent to the admission (or at least not to oppose the admission) of the [Voyage Charter] to the Spanish court be refused; and
>
> 3. costs reserved."

44. I thus left it to the discretion of the Spanish courts whether they received evidence of the Voyage Charter and its terms. I state later in this judgment my reasons for making this order.

45. Following my order, Endesa disclosed the Voyage Charter to NNC on 25 November 2008, although, of course, NNC had had a copy of it for some time. By written application dated 3 December 2008, NNC applied to the Almería Court to introduce the Voyage Charter in the proceedings there. I was told[3] by Mr. Lord that the Almería Court had already prepared its judgment on NNC's appeal by way of reposición when the application was made.

Judgment of the Almería Court dated 3 December 2008

46. On 3 December 2008, the Almería Court delivered its judgment on NNC's appeal by way of reposición against that court's refusal to decline jurisdiction because of the arbitration agreement. The reasoning does not clearly emerge from the translation, but, in summary, the Almería Court appears to have decided as follows.

    i) First, it appears to have "confirmed [the] inadmissibility of the express submission of the parties to arbitration and, therefore, rendered invalid the exception regarding submission to arbitration". This appeared to have been on the basis that NNC had brought judicial proceedings (viz. the Commercial Court Action) rather than arbitration proceedings in London[4], and thereby waived any arbitration agreement that might have existed between the parties. To this extent, the court confirmed its original decision.

    ii) Secondly,[5] the Almería Court said that since originally there had been only a request for the Spanish court to decline jurisdiction on the basis of Article 27, i.e. pre-existing court proceedings, NNC "should not be allowed to request a

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3 By email dated 25 March 2009.
4 See paragraph 1 of the judgment.
5 See paragraph 2 of the judgment.

refusal of jurisdiction on different grounds (submission to arbitration), rather than on those first put forward" [6]. It held that there had been no request to the Almería Court to decline jurisdiction under Article 24 of the Regulation.

iii) Thirdly, it confirmed its previous decision that, as a matter of Spanish law – which was the correct law to apply to a procedural question whether judicial proceedings should be stayed – the arbitration clause was not incorporated. Moreover, English law had not been adequately asserted as the governing law of the dispute in the manner in which it should have been if it was to be considered by the court.

The Almería Court's further order dated 29 December 2008

47. I was told that, because the Almería Court had already prepared its judgment dated 3 December 2008 when NNC applied on that date for the court to receive evidence of the Voyage Charter, the Almería Court took further time to consider NNC's application. On 29 December 2008, it made a further order the effect of which appears (from the translation) to be that, having considered NNC's application to adduce further evidence, the court confirmed its previous order dated 3 December 2008, but nonetheless ordered that the Voyage Charter should be included in the judicial file, and form part of the ongoing proceedings. It will therefore be available to NNC on appeal by way of apelación against the order of 3 December 2008, which is presently stayed.

The Applications

48. The applications before me were thus as follows:

i) in the Commercial Court Action, an application by Endesa for an order that the Court has no jurisdiction over the subject matter of the claim and that accordingly the Commercial Court Action should be dismissed ("Endesa's Jurisdiction Application");

ii) in the Commercial Court Action, an application by NNC for disclosure of the Voyage Charter ("NNC's Disclosure application");

iii) in the Arbitration Action an application by NNC for a declaration that certain disputes between the parties are referable to London arbitration ("NNC's Declaration Application");

iv) in the Arbitration Action an application by NNC for an anti-suit injunction against Endesa, restraining it from prosecuting proceedings in Spain ("the Anti-Suit Application");

v) in the Arbitration Action, an application by Endesa for an order that the Court has no jurisdiction; although this was technically a self-standing application, Endesa was content for its submissions on jurisdiction to be considered at the same time as those in the substantive applications in the Arbitration Action.

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[6] See paragraph 4 of the judgment.

Rationale behind the jurisdiction dispute

49. The reason why it appears that Endesa is keen to establish the jurisdiction of the Spanish courts is that it thereby seeks to apply Spanish law to the substantive dispute between itself and NNC. Endesa's position is that, if Spanish law applies, then NNC, as owner of the Vessel, will be unable to raise any defence based on the concept of "due diligence" under the Hague-Visby Rules, because under the Spanish Commercial Code, there is absolute liability imposed on a carrier for cargo, except for Acts of God and *force majeure*. I was not addressed as to the merits of this contention, but it forms the basis for this fierce jurisdictional dispute.

The respective approaches of the parties to the applications

50. Not surprisingly, the respective approaches of the parties to the issues that arise in the various applications were very different.

NNC's position at the hearings in October and November 2008

51. Ms. Vasanti Selvaratnam QC and Mr. Tom Whitehead, who appeared on behalf of NNC, submitted that, notwithstanding that, in *The Front Comor*[7], the House of Lords had recently referred the following question to the European Court of Justice ("the ECJ"):

> "Is it consistent with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement."

and that judgment was awaited from the ECJ[8], the current position under English law was that this court has clear jurisdiction to grant an anti-suit injunction to enforce a London arbitration clause notwithstanding that a defendant to the injunction application has commenced proceedings in another Member State of the European Union. This was because such proceedings fell outside the scope of the Regulation by virtue of the provisions of Article 1, paragraph 2(d), which states: "This regulation shall not apply to … arbitration".

52. Ms. Selvaratnam submitted that, under English law, the Bill of Lading clearly incorporated a London arbitration clause and that, accordingly, a declaration that certain disputes between the parties are referable to London arbitration and an anti-suit injunction should be granted. Ms. Selvaratnam submitted that NNC's primary vehicle for seeking its declaratory and injunctive relief was the Arbitration Action.

53. However, Ms. Selvaratnam submitted, since it was by no means certain that NNC's primary case (namely that its claim for declaratory and anti-suit relief based on the arbitration agreement fell outside the scope of the Regulation) would turn out to be the correct analysis in the light of the reference in the *Front Comor*, it would be

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7 *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA ("The Front Comor")* [2007] UKHL 4, 1 Lloyd's Reports 391 HL.

8 Advocate General Kokott delivered her opinion on 4 September 2008, proposing that the question referred be answered in the negative; see Case C-185/07.

wholly inappropriate to dismiss Folio 64 whilst a serious issue is raised as to whether this court can assume – and indeed, retain – jurisdiction under Article 5(1) of the Regulation in relation to NNC's claim that the parties are subject to a London arbitration agreement. Thus, she submitted, the Commercial Court Action (with its proposed claim for declaratory and injunctive relief as set out in the draft Particulars of Claim) provided an alternative jurisdictional basis for granting the same relief – namely under Article 5 of the Regulation, on the basis that the place for performance of the obligation in question (namely the obligation to arbitrate) is London. Ms. Selvaratnam submitted that there would only be a need to decide the issues in the Commercial Court Action if the decision of the ECJ in *The Front Comor* changes the law as it currently stands. She therefore proposed that the Commercial Court Action (including Endesa's jurisdictional challenge) should be stayed pending the decision of the ECJ on the reference in *The Front Comor*, with liberty to each party to apply to restore the matter on seven days' notice to the other party's London solicitors following determination of that reference. She further submitted that adopting this route would save time at the hearing on 29 October and would avoid the need to argue points which were then academic but which might become relevant in the light of the ECJ's decision. For these reasons, she submitted, the Court should treat the Arbitration Action as the lead application at the hearing and stay (or adjourn) the Commercial Court Action until such time as it became relevant. That would be in the event that the ECJ held that claims for a declaration that a London arbitration clause was binding were to fall outside the scope of the arbitration exception in Article 1, paragraph 2(d), and that accordingly, no anti-suit injunction should be granted. In that case, NNC would contend that such a claim fell within Article 5(1). If that argument were successful, NNC would need to preserve the existence and status of the Commercial Court Action, as the former, as opposed to the Arbitration Action, was the only set of proceedings in respect of which the English court could be said to be first seised.

54. She also submitted that it would be wrong to dismiss the Commercial Court Action, because it would also have the consequence of removing the current stay in the Spanish proceedings in the Almería Court on the grounds that the English court was first seised. Since the Spanish proceedings were brought in breach of the arbitration clause, that would have the effect of rewarding Endesa for the consequences of its own breach of contract. Moreover, it was wholly wrong of Mr. Lord to suggest that Mr. Askins had no honest belief in circumstances justifying jurisdiction under the Regulation when he signed the statement of truth in Folio 64. It was not his fault, but rather Carboex/Endesa's fault, that he had not been provided with a copy of the Voyage Charter, and until he saw the actual charterparty he could not know for certain that there was indeed a London arbitration clause. His first witness statement dated 10 June 2008 shows that, in the event, that there was an arbitration clause, Folio 64 could properly be the vehicle for an arbitration claim.

55. Likewise, in relation to the Arbitration Action, Ms. Selvaratnam submitted that the Court should make an anti-suit injunction but that there should be liberty to apply once the ECJ has delivered judgment in the *Front Comor*.

Endesa's position at the hearings in October and November 2008

56. Mr. Richard Lord QC and Mr. Richard Blakeley appeared on behalf of Endesa. Their overall approach was that the court should immediately dismiss the Commercial

Court Action because there was and is no possible basis for this court having jurisdiction in that action; that there never was any basis for NNC, by Mr. Askins, claiming that this court had jurisdiction under the Regulation since that would have required the Bill of Lading to have incorporated an agreement to submit to the jurisdiction of the English court (as opposed to merely an agreement to submit to London arbitration, or an agreement that English law should govern the Bill of Lading); that it was disingenuous of Mr. Askins to imply, in his fifth witness statement, that the newly advanced alternative claim under Article 5(1) had ever formed an alternative basis for the Commercial Court Action at any earlier stage; that the statement of truth in the Commercial Court Action claim form was manifestly false, as Mr. Askins never had any factual basis for asserting a belief that the Bill of Lading was subject to an agreement to submit to the jurisdiction of the English court, and that he must have known that the mere fact that, by implication, the Bill of Lading might (contrary to Endesa's submissions) have been governed by English law was not sufficient to ground jurisdiction under the Regulation; the fact that CPR 6.20(5) might have separately given the English court jurisdiction, if leave was sought to serve outside the jurisdiction, was irrelevant. Accordingly, the court should view the issue of the Commercial Court Action as a cynical attempt by Mr. Askins to prevent the Almería Court from being the court first seised for the purposes of the Regulation in circumstances where he well knew that there was no basis for the English court taking jurisdiction under the Regulation.

57. So far as the applications in the Arbitration Action were concerned, Mr. Lord contended that no declaration or anti-suit injunction should be made in NNC's favour. This was on the basis:

i) that the Almería Court's decision on the issue as to incorporation of any arbitration agreement in the Bill of Lading was *res judicata* as between NNC and Endesa, and that decision should be recognised by the English court;

ii) that even if NNC were not precluded by issue estoppel, in any event, even if a London arbitration agreement were incorporated into the Bill of Lading, NNC had waived its right to insist on London arbitration by its repudiation of the arbitration agreement;

iii) that even if there had been no waiver or repudiation of the arbitration agreement, Spanish law was the applicable law under English conflict of laws; and under Spanish law the arbitration clause was not incorporated in the Bill of Lading;

iv) that, even if it were appropriate to apply English law, under English law the arbitration clause would not be incorporated in the Bill of Lading, as it was wholly uncertain to which charterparty the Bill of Lading was referring.

v) that, in any event, it would be wrong as a matter of discretion to grant a declaration as to incorporation of the arbitration clause, contradicting a court of competent jurisdiction in a Member State;

vi) that, in any event, it would be wrong for the court to grant an anti-suit injunction for the following reasons:

a) For the reasons set out above, NNC had no right to arbitrate in England and no right not to be sued in Spain and accordingly has no right to seek an anti-suit injunction.

b) The English court's jurisdiction to grant such an injunction is presently unclear. The Court should exercise the greatest caution and/or should adjourn the question until the ECJ has ruled in the *Front Comor* (something which will not cause any real prejudice to either side).

c) For reasons of comity, the Court should in its discretion refuse to grant anti-suit relief.

d) As NNC's Commercial Court action was commenced in abuse of the Court's process, the Court should in its discretion refuse to grant anti-suit relief.

e) As NNC has been guilty of substantial delay both in absolute terms and in respect of the procedural steps it has taken, the Court should in its discretion refuse to grant anti-suit relief. NNC have only themselves to blame for the fact that it is now facing an adverse judgment in Spain.

Subsequent post-hearing events: delivery of my draft judgment, and the ECJ's judgment in *The Front Comor*

58. On 9 February 2009, I circulated a draft of my judgment in this matter ("the draft judgment") for the purposes of a formal hand-down on 13 February 2009. In summary, in the draft judgment I held:

i) that it would be wrong to adjourn Endesa's Jurisdiction Application in the Commercial Court Action pending the decision of the ECJ in *The Front Comor*, and that I should accede to Endesa's Jurisdiction Application; neither party had provided the court with any information as to the likely date for the hand-down of the ECJ's judgment and, in circumstances where I had concluded that this Court had no jurisdiction under the Regulation to entertain the Commercial Court Action, it would be wrong to preserve its purported first-seised status and to delay its dismissal;

ii) that those parts of the judgments of the Almería Court that comprised its decision that:

a) the arbitration clause was not incorporated in the contract of carriage between NNC and Endesa; and

b) that, even if it were so incorporated, NNC had waived the arbitration clause by issuing the Commercial Court Action,

were not decisions on a matter that fell within the scope of the Regulation; that its decision in relation to those issues fell outside the Regulation because of the arbitration exception contained in Article 1(2)(d);

iii) that, accordingly, I was not obliged to recognise those parts of those judgments under the Regulation; and that, pursuant to Section 32 of the Civil Jurisdiction

and Judgments Act 1982 ("the 1982 Act"), I was not bound by the decision of the Almería Court on those issues, and could thus decide for myself whether the arbitration clause had been validly incorporated into their contract, and, if so, whether it had been waived, or the agreement repudiated;

iv) that in the circumstances, it was not necessary for me to consider Ms. Selvaratnam's alternative argument that, even if the judgments of the Almería Court on these issues would otherwise be *res judicata*, this court should refuse to recognise them on public policy grounds pursuant to Article 34 of the Regulation;

v) that the proper law governing the question of incorporation of the arbitration clause, and the issue of repudiation, was the proper law of the Bill of Lading, or the putative law of the arbitration agreement, namely English law;

vi) that, as a matter of English law, the arbitration agreement had been incorporated in the contract between NNC and Endesa;

vii) that, in my judgment, NNC had not demonstrated such clear and unequivocal conduct by its institution and prosecution of the Commercial Court Action as to amount to repudiation of any arbitration agreement between the parties or waiver of its rights to arbitrate;

viii) that, in my judgment, principles of comity did not prevent this court from exercising its discretion to make the declaration sought by NNC; indeed, that the Almería Court, in its judgment dated 3 December 2008,[9] had clearly recognised that its decision would not be binding on this court, and that this court might well decide the incorporation and waiver/repudiation issues under English law in an opposite manner from that in which the Almería Court had decided such issues as a matter of Spanish law; and that, accordingly, I would make the declaration sought by NNC;

ix) that, if I were otherwise satisfied that it was appropriate to grant an anti-suit injunction, I should make such an order notwithstanding the pending decision of the ECJ in *The Front Comor*, with liberty to the parties to apply when that decision had been delivered;

x) that the then-current position, as a matter of English law, was that this Court had jurisdiction to grant an anti-suit injunction to enforce a London arbitration clause notwithstanding that the defendant to the injunction claim had commenced proceedings in a Member State of the European Union, on the grounds that such proceedings fell outside the scope of the Regulation, by virtue of Article 1 paragraph 2(d); see *Through Transport*[10]; *The Front Comor*[11]; *Verity Shipping v NV Norexa (The Skier Star)*[12]; and that that position was binding on me, notwithstanding the reference by the House of Lords in *The Front Comor* of the question whether such a jurisdiction is compatible with the Regulation;

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9 Paragraph 4.
10 *Supra* at paragraphs 41 – 49.
11 *Supra* at [2005] 2 Lloyd's Rep 257 (Colman J); and [2007] UKHL 4.
12 [2008] 1 Lloyd's Rep 652 at paragraphs 28-30.

xi) that there was no reason for the court to decline to the grant of an anti-suit injunction on the grounds of: (a) comity; (b) abuse of process; or (c) delay;

xii) that, accordingly, I proposed to grant the anti-suit injunction sought by NNC, with liberty to the parties to apply in the event that the ECJ confirmed the opinion of the Advocate General in *The Front Comor*.

59. However, by an irony of fate, on 10 February 2009, (which was the day after I circulated the draft judgment) the ECJ delivered its judgment in *The Front Comor*[13]. The Court answered the question raised by the House of Lords as follows:

> "It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

60. In the circumstances, I received further written submissions on 12 and 13 February 2009, and heard further oral argument from counsel on 13 February 2009 on the implications of the decision in *The Front Comor*.

61. It was common ground between Mr. Lord and Ms. Selvaratnam that the decision in *The Front Comor* prevented this court from granting an anti-suit injunction, and that, accordingly, NNC's Anti-Suit Application should be dismissed.

62. However, Ms. Selvaratnam submitted that, notwithstanding the decision in *The Front Comor*, this court could, and should, still grant the declaration sought by NNC in its Declaration Application in the Arbitration Action. Mr. Lord submitted to the contrary, namely, that, in the light of the decision in *The Front Comor*, there was no jurisdiction to make such a declaration. The further arguments which I heard from counsel on this date were principally directed to this issue, although I also heard further argument in relation to the costs of the Commercial Court Action.

The Commercial Court Action

63. The issue in relation to the Commercial Court Action is whether I should strike it out on the grounds that it is not a claim with which this court has jurisdiction to deal under the Regulation, or whether I should allow it to remain in existence on the basis of NNC's secondary, alternative argument, namely that the claim in Folio 64, as now formulated in the proposed draft Particulars of Claim in that action, served in October 2008, is a claim that can properly be characterised as a claim under Article 5(1) of the Regulation; this being on the alleged grounds that the obligation to perform the arbitration agreement is one that falls to be performed in England. NNC wishes to preserve the Commercial Court Action, with its asserted "first seised" status as a claim within the Regulation, in order to maintain the stay imposed in the Spanish proceedings by the Almería Court; the continuation of such a stay and the determination by this court of the issue of the validity of the arbitration agreement in

[13] 10 February 2009, Case C-I85/07.

NNC's favour in a first-seised action within the Regulation (i.e. Folio 64) would effectively result in the arbitration proceedings in London, which is NNC's goal.

Decision and discussion

64. In my judgment, the Commercial Court Action ought to be dismissed, on the basis that the English court has no power under the Regulation to hear the claim made in the Commercial Court Action, whether as originally formulated in the Folio 64 claim form, or as subsequently formulated in the proposed draft particulars of claim in that action, served in October 2008. My reasons for dismissing the claim in Folio 64 are as follows.

65. First, this court does not have, and has never had, power to hear the claim made in Folio 64 pursuant to Article 23 of the Regulation. The evidence now shows (as, indeed, was common ground) that both the relevant charters contained London arbitration clauses, and, therefore, necessarily did not contain clauses agreeing to submit to disputes to the exclusive or non-exclusive jurisdiction of the English courts, such as to invoke this court's jurisdiction based on Article 23. Unless, therefore, there is another sustainable ground for supporting the jurisdiction of the English court under the Regulation in respect of Folio 64, the claim must be dismissed. It would clearly be wrong for this court to maintain jurisdiction in the light of a valid jurisdictional challenge simply in order to permit one party to take advantage of the "first-seised status" of the Commercial Court Action, when such proceedings were issued in circumstances where the English court in fact had no jurisdiction under the Regulation, and the asserted basis for jurisdiction was incorrect.

66. Secondly, the fact that the contract of carriage contained in the Bill of Lading was, or may be, governed by English law did not of course provide any basis for this court having jurisdiction under the Regulation, as Ms. Selvaratnam accepted in the course of argument. As Mr. Lord submitted, the fact that CPR Rule 6.20(5)[14] might have separately given this court jurisdiction, had it chosen to assume it, on the grounds that English law governed the contract of carriage, is irrelevant. No leave was (or has even been) applied for by NNC to serve proceedings out of the jurisdiction on this ground. Even if leave had been applied for and obtained, such a claim would not be a claim under or within the Regulation, since it would not fall within Articles 2-7, and its issue would, indeed, contravene Article 2.

67. Thirdly, I do not consider that the alternative basis put forward by Ms. Selvaratnam, on behalf of NNC, in an attempt to ground the jurisdiction of the English court under the Regulation, is sustainable. The argument, as I have mentioned, is that the claim, as subsequently formulated in the draft particulars of claim in the Commercial Court Action, served on 16 October 2008[15], fell within Article 5(1) of the Regulation, as London was the place of performance of the contract to arbitrate. Although NNC's primary position was that, in fact, such a claim fell outside the scope of the Regulation by virtue of the provisions of Article 1(2)(d), (and, consequently, that the court should grant the relevant relief sought in the Arbitration Action (Folio 667), where similar relief to that now sought in Folio 64), NNC nonetheless contended that

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14 The old version of the rule, prior to its amendment, in October 2008.
15 As described in paragraph 40, above.

the alternative Article 5(1) argument had a reasonable prospect of success so as to justify the maintenance of the Commercial Court Action as a Regulation claim.

68. However, in my judgment, the claim for declaratory and anti-suit relief in relation to the alleged arbitration agreement, as now formulated in the draft particulars of claim in Folio 64, does not fall within Article 5(1) of the Regulation. Accordingly, such claim does not provide any sustainable alternative basis for the jurisdiction of this court under the Regulation or the maintenance of Folio 64.

69. My reasons for this conclusion are as follows:

i) Paragraphs 22 and 23 of the ECJ's decision in *The Front Comor* make it clear that proceedings, such as the claims made here in the draft particulars of claim in the Commercial Court Action, and in the Arbitration Action (and, indeed, similar arbitration claims made in English proceedings pursuant to CPR Rule 62), are to be characterised as proceedings falling *outside* the scope of the Regulation. That is because such proceedings come within the exclusion contained in Article 1(2)(d). In those paragraphs the Court stated:

> "22. In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (*Rich*[16], paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (*Van Uden*[17], paragraph 33).
>
> 23. Proceedings, such as those in the main proceedings [i.e. the English proceedings], which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001."

ii) Thus it regarded the English proceedings as being proceedings the subject matter of which was to protect West Tankers' rights to arbitrate, and therefore *outside* the scope of the Regulation, as did Advocate General Kokott in her opinion in *The Front Comor*[18]. The fact that, in contrast, the Court regarded[19] the preliminary issue (as to the applicability and validity of an arbitration agreement) raised in the context of a jurisdictional dispute in the proceedings before the Tribunale di Siracusa, as being *within* the scope of the Regulation (on the grounds that the characterisation of the preliminary issue was the same as that of the principal proceedings before that court – viz. the claim for damages pursuant to Article 5(3)), was irrelevant to its characterisation of the English proceedings.

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16 *Marc Rich & Co AG v Societa Italiana Impianti PA* [1991] 2 European Community Cases, 358 at 365.
17 *Van Uden Maritime BV v Deco-Line* [1998] ECR I-7091.
18 Case C-185/07, opinion delivered 4 September 2008.
19 In paragraphs 25 – 27 of its judgment.

iii) The ECJ's approach to the characterisation of *the English proceedings* in *The Front Comor* as being subject to the arbitration exception and thus outside the scope of the Regulation, is orthodox and consistent with *inter alia*:

a) the approach previously taken by Advocate General Darmon in his opinion in *Marc Rich* (*supra*), which included a compelling analysis of why Article 5(1) could not apply to claims of this sort relating to disputes about the existence of arbitration agreements;[20]

b) the decision of the ECJ in the same case[21], (albeit that the Court there took a broader view of the scope of the "arbitration exception" than the ECJ in *The Front Comor*; its actual decision was narrow and confined to the single issue as to whether litigation for the appointment of an arbitrator was excluded from the Convention); [22]

c) the analysis of Aikens J (as he then was) in *The "Ivan Zagubanski",*[23] who concluded[24], after a comprehensive review of English and European authority, that claims (such as those now formulated in the draft particulars of claim in Folio 64) for a declaration that a valid arbitration agreement exists, fell within the arbitration exception contained in Article 1(4) of the Brussels Convention[25], and accordingly outside the scope of the Brussels Convention, on the basis that the principal focus or subject matter of such proceedings was "arbitration";

d) the decision of the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Limited v New India Assurance Association Company Limited*[26], who approved the analysis of Aikens J in *"The Ivan Zagubanski*;

e) the characterisation by the House of Lords of the English proceedings in *The Front Comor* as being outside the scope of the Regulation.[27]

iv) The fact that in *The Front Comor*, the Court[28] characterised the preliminary issue (as to the applicability and validity of the alleged arbitration agreement), raised in the jurisdictional challenge in the tort proceedings before the Tribunale di Siracusa, as proceedings within Article 5(3) of the Regulation (on the grounds that the main claim for damages was to be so characterised) does not assist Ms. Selvaratnam's alternative argument in relation to the Commercial Court Action. In relation to that action, there can be no question but that (in its intended revised form as an arbitration claim) its subject matter, i.e. the nature of the rights which it seeks to protect, are NNC's rights to have its disputes with Endesa resolved by London arbitration.

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20 See paragraphs 76 to 94 of Advocate General Darmon's opinion.
21 [1992] 1 Lloyd's Reports 342; [1991] ECR I-3855.
22 See paragraph 73 of the judgment of Aikens J (as he then was) in *The "Ivan Zagubanski", Navigation Maritime Bulgare v Rustal Trading Limited* [2002] 1 Lloyd's Reports 106.
23 *Supra.*
24 See paragraphs 71 and 72.
25 In similar terms to Article 1(2)(d) of the Regulation.
26 [2004] EWCA Civ 1598, at paragraph 44.
27 [2007] UKHL 4, [2007] 1 Lloyd's Reports 391, at paragraphs 13 – 16.
28 At paragraphs 26 and 27 of its judgment.

v) Ms. Selvaratnam also referred to discussion of the topic by Thomas Raphael, barrister, in his book *The Anti-Suit Injunction*[29], and, in particular, his suggestion[30] that:

> "… if a claim for a declaration that a London arbitration clause is binding were to fall outside the arbitration exception, it would probably fall within Article 5(1).";

and also to the passage[31] where he says:

> "… If in the pending reference in *The Front Comor* the European Court were to conclude that injunctions to enforce an arbitration clause were within the material scope of the regime for the purposes of jurisdiction, there would be a strong practical pressure to locate a Brussels-Lugano jurisdiction that would apply, however forced the semantic analysis might be, since the English courts would wish to retain unconstrained jurisdiction to hear claims for anti-suit injunctions to enforce arbitration clauses, at least where the foreign proceedings are outside the Brussels-Lugano zone."

However, I am not assisted by Mr. Raphael's discussion of the topic, which pre-dated the ECJ's judgment in *The Front Comor*. I am bound by the characterisation of such claims as being outside the scope of the Regulation adopted by the Court of Appeal in *Through Transport* and by the House of Lords and the ECJ in *The Front Comor*.

70. It follows that this court has no jurisdiction in relation to the Commercial Court Action as a claim made under the Regulation, and I strike it out.

71. I should add, for the sake of completeness, that it was, correctly, not suggested by Ms. Selvaratnam that I should allow the Commercial Court Action to remain in existence (and thereby somehow preserve this court's status as the court first seised under the Regulation) on the grounds that the relief sought in it could be amended to incorporate the relief sought in the Arbitration Action, and leave given, retrospectively, to serve the Commercial Court Action claim form out of the jurisdiction pursuant to part 62.5 of the CPR, and what is now CPR Part 6.40.

Costs in the Commercial Court Action

72. It follows that NNC must pay the costs of, and incidental to, the Commercial Court Action. I order that NNC should do so on the indemnity basis. My reasons for such an order are as follows:

i) Despite Mr. Lord's submissions, I am not prepared to find on the basis of the various accounts in Mr. Askins' witness statements, and without cross-examination, that Mr. Askins was acting dishonestly in starting the Commercial Court Action on the grounds that, as Endesa alleges, he must have

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29 Oxford University Press, 2008, paragraph 17.01 – 17.12.
30 At paragraph 17.11.
31 At paragraph 17.12.

known that there was no reasonable basis for asserting that the English court had jurisdiction under the Regulation. It would not be fair or appropriate to reach such a conclusion.

ii) However, although Mr. Askins was in a somewhat difficult position, given Carboex and Endesa's refusal to provide him with a copy of the Voyage Charter, the reality was that all the information which he did have available to him (including Mr. Alegre's comments on the Bill of Lading) strongly indicated that the Bill of Lading was subject to an arbitration clause – either under the terms of the Head Charter or under the terms of the Voyage Charter. There was no indication anywhere in the information available to Mr. Askins to support an objectively reasonable belief that, contractually, the parties were subject to an agreement to submit their disputes under the Bill of Lading to the exclusive or non-exclusive jurisdiction of the English courts. Indeed, the Bill of Lading, on its face, referred to an arbitration clause.

iii) An experienced solicitor in Mr. Askins' position should have known that the mere agreed application of English law to disputes under the contract of carriage could not *per se* have grounded jurisdiction under the Regulation, and thus the possibility of issuing proceedings for service out of the jurisdiction without leave.

iv) The claim form in Folio 64 does not set out a comprehensive basis for Mr. Askins' asserted belief that this court had jurisdiction under the Regulation on the grounds of an English court jurisdiction agreement. Moreover, on the evidence before me, there is nothing to suggest that he had an alternative Article 5(1) claim in contemplation at the date of the issue of the proceedings. If he did, he should, in any event, have clearly advanced it as an alternative claim and have referred specifically to its asserted factual and legal basis: see *Clarke v Marlborough Fine Art*[32]; *Binks v Securicor Omega Express*[33].

v) In short, the claim form in Folio 64 gives every impression of a document that was hurriedly put together in an attempt to ensure that this court was first seised under the Regulation, in circumstances where proper consideration of the factual and the legal position would have shown that it was extremely dubious that this court had any such jurisdiction. If Mr. Askins genuinely believed that there was such jurisdiction, then it was incumbent upon him to set out in the claim form the factual basis for that belief, in a manner that was transparent and comprehensible.

vi) It is very important in cases said to fall under the Regulation, where this court takes jurisdiction on the basis of a statement in a claim form pursuant (now) to CPR 6.33, and accordingly there is no requirement for the court's leave to serve the proceedings out of the jurisdiction, that solicitors issuing proceedings take particular care to ensure that they have a reasonable basis for their belief, and that the facts supporting it are stated in a transparent fashion in the claim form. First seisure under the Regulation may obviously have important

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32 [2002] 1 WLR 1731.
33 [2003] 1 WLR 2557.

consequences for both parties, and for proceedings in other jurisdictions. It is therefore vitally important: (a) that jurisdiction is not wrongly asserted without reasonable belief; and (b) the grounds are clearly stated so that a jurisdictional challenge can, if necessary, be speedily and easily made. This did not happen in the present case.

vii) Ms. Selvaratnam, in detailed written and oral submissions, contended that in the light of Endesa's conduct, both before the proceedings began and during the course of the proceedings, in refusing to make available the Voyage Charter, which she submitted was "obstructive and inimical to the spirit in which litigation should be conducted under the CPR", the court should make no order for costs in the Commercial Court Action, or should limit any order which was adverse to NNC to the period after 8 October 2008, when NNC had obtained a copy of the Voyage Charter from Carboex. She further submitted that, during the period up until this date, Endesa only had itself to blame for any costs which it incurred which were the result of its "illegitimate refusal to give disclosure of the [Voyage Charter]". She submitted that:

> "Folio 64 remained in existence as a means by which NNC sought disclosure of the [Voyage Charter]. As regards formal opposition to the application made by Endesa challenging jurisdiction in Folio 64, NNC position was reserved."

Further, she referred to Mr. Alegre's conduct in failing, amongst other things, to provide the Voyage Charter and to confirm its terms. She also relied upon what she referred to as the "unsubstantiated allegations of dishonesty" made against Mr. Askins. She also relied on the fact that this court had found that Endesa was in breach of the arbitration agreement. All these matters, she submitted, were matters which, in the exercise of my discretion under CPR 44.3, pointed to no order for costs being made.

viii) I have carefully considered all these matters urged by Ms. Selvaratnam, but I do not find them persuasive. In my judgment, it is quite wrong to attempt to characterise the primary "focus" of Folio 64 as being to obtain disclosure of the Voyage Charter. The application for disclosure in the Commercial Court Action was only made on 10 June 2006, after Endesa had challenged jurisdiction. Such an application could have been made in the arbitration claim issued at a much earlier date, since Mr. Askins knew as early as 22 January 2008 that Mr. Alegre had said that the Voyage Charter contained an English Law and arbitration clause. Indeed, such an application was finally made in the Arbitration Action issued on 8 July 2008, although even then no urgent application was made for disclosure.

ix) On the contrary, the obvious focus of the Commercial Court Action was at all times to attempt to preserve the purported first-seised status of this court. The fact that Endesa was (as I have found – see below) in breach of the arbitration agreement in continuing with the substantive Spanish proceedings, or did not volunteer a copy of the Voyage Charter when asked to do so, is not, in my judgment, relevant conduct to the issue of indemnity costs in the context of the Commercial Court Action. Even if it is, I afford it very little weight. Nor, on a proper analysis of precisely what he did say and do, was Mr. Alegre's conduct

a relevant consideration. Likewise, I do not consider that the manner in which Mr. Lord presented Endesa's argument about Mr. Askins' conduct is a matter that falls to be taken into account in the exercise of my discretion. Although I have not found the allegation of dishonesty proved (see paragraph 72 i) above), I do not consider that it was improper for such an allegation to have been advanced, or that Mr. Lord was acting in breach of any professional obligation in so doing. On the contrary, Mr. Lord presented this aspect of Endesa's case fairly, and in a restrained and proportionate manner.

x) I have concluded (in paragraph 72ii) above) that:

> "There was no indication anywhere in the information available to Mr. Askins to support an objectively reasonable belief that, contractually, the parties were subject to an agreement to submit their disputes under the Bill of Lading to the exclusive or non-exclusive jurisdiction of the English courts. …."

The award of costs on the indemnity basis is a mark of the court's disapproval that, in such circumstances, NNC asserted – and continued to assert – the purported jurisdiction of this court under the Regulation, and did so, at least up until Mr. Askins' first witness statement, dated 10 June 2008, on a purported basis that was not clearly explained.

xi) Accordingly, taking into account all the circumstances, I consider it appropriate to award costs on the indemnity basis, as, in my judgment, the situation here was outside the parameters of normal acceptable conduct in litigation of this sort[34].

The Arbitration Action

The Issues

The Anti-Suit Application

73. As I have already said, NNC correctly accepts that, in the light of the ECJ's decision in *The Front Comor*, the Anti-Suit Application must now fail. Accordingly, no issues arise in relation to that application.

The Declaration Application

74. The declaration that NNC seeks is in the following terms:

> "The London arbitration clause of a Charterparty dated 25 September 2007 and made between Morgan Stanley Capital Group Inc as disponent owners and Carboex SA as charterers of the vessel WADI SUDR ('the Carboex charter') is validly incorporated into the Bill of Lading no.CIL 07/49 dated 6 December 2007 issued by the Claimant in respect of a cargo of

[34] See *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson & Another* [2002] EWCA Civ 879.; *JP Morgan Chase Bank and Others v Springwell Navigation Corporation* [2008] EWHC 2848 (Comm).

> 64,609MT steam coal in bulk shipped at Indonesia aboard the said vessel ('the Bill of Lading') and is binding upon the Defendant."

75. The issues that arise in connection with the Declaration Action can be summarised as follows:

    i) Are the decisions of the Almería Court dated 31 July and 3 December 2008 in relation to NNC's jurisdictional challenge, to the effect that: a) no arbitration clause was incorporated into the Bill of Lading; and b) NNC had waived its right to rely on any arbitration agreement by starting the Commercial Court Action, judgments which require to be recognised in England under the Regulation, as judgments given in a civil or commercial matter?

    ii) If not, and this court is entitled, and indeed obliged, under section 32 of the 1982 Act, to look at the matter afresh, is Spanish or English law the proper law to apply to the incorporation issue and the waiver issue?

    iii) Applying the appropriate law, was the arbitration clause, in either the Voyage Charter or the Head Charter, incorporated into the contract between NNC and Endesa?

    iv) Applying the appropriate law, did NNC waive or repudiate any arbitration agreement by issuing the Commercial Court Action?

    v) Should this court, as a matter of discretion, grant a declaration as to incorporation that conflicts with a judgment by a court of another Member State?

Issue (1): is this court required under the Regulation to recognise the judgments of the Almería Court in relation to incorporation of the arbitration agreement and waiver/repudiation of the arbitration agreement?

NNC's submissions

76. Notwithstanding the ECJ's decision in *The Front Comor*, NNC maintained its submission made at the hearing that, whilst it accepted that the judgments of the Almería Court were otherwise *res judicata*, this court should, and indeed was bound, nonetheless to refuse recognition of them on various grounds.

77. In support of this contention, Ms. Selvaratnam submitted as follows:

    i) Those parts of the Almería Court's judgments which related to the two issues of incorporation and waiver/repudiation of the arbitration agreement ("the relevant issues") were severable from its decision to grant a stay under Article 27, because the subject matter of those two issues was arbitration, which was excluded from the Regulation. Therefore, as required by section 32 of the 1982 Act, this court should decline to treat as enforceable those aspects of the Almería Court's decision on those issues. Article 48 of the Regulation imposed a duty on the court in which enforcement was sought, to consider whether any parts of the judgment did not fulfil the conditions for

enforcement, and only give a declaration of enforceability in relation to those parts which were. Similarly, for recognition purposes, some parts of a judgment were severable.

ii) In the alternative, even if the Almería Court's decision on the relevant issues was a Regulation judgment, the court should not recognise that judgment on public policy grounds, pursuant to Article 34(1) of the Regulation.

78. After delivery of the ECJ's judgment in *The Front Comor*, she further submitted as follows:

i) The ECJ's judgment in *The Front Comor* went no further than the ruling appearing at the end of the ECJ's judgment, in answer to the specific question referred by the House of Lords. Accordingly, the ECJ's judgment is only binding as to its determination of the issue whether an anti-suit injunction is available to restrain proceedings before the courts of another Member State in alleged breach of an arbitration agreement. She sought to rely upon the case of *Da Costa en Schaake NV v Nederlandse Belastingadministratie*[35] to support her submissions that the ECJ decision in *The Front Comor* was only binding as to the question which it was asked specifically to decide.

ii) The ECJ was not dealing with issues of recognition because such issues did not arise on the facts of *The Front Comor*.

iii) Accordingly, the statements made, in particular, in paragraphs 26 and 27 of the ECJ's judgment were not more than *obiter dicta*; they were not part of the *ratio decidendi* of the decision, and, as such, were not binding on this court, if, and to the extent that, such statements sought to suggest that a decision on the validity and applicability of an arbitration agreement as a preliminary issue in the context of a jurisdictional challenge was a judgment within the Regulation.

iv) The ECJ in *The Front Comor* did not overrule the ECJ in *Marc Rich, supra*. Indeed, the Court refers to this decision with apparent approval in paragraph 22 of its judgment. The *Marc Rich* judgment endorsed the approach of Advocate General Darmon in that case (as noted by Aikens J in *The Ivan Zagubanski* at paragraph 74), and adopted a very broad view of the scope of the arbitration exception. She referred, in particular, to paragraphs 18 and 21 of the judgment of the ECJ. She also relied on Advocate General Darmon's view, as summarised by Aikens J in *The Ivan Zagubanski* [36], that:

> "The Brussels Convention should also not apply to the issue of 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 arbitration."

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35 [1963] CMLR 224.
36 See paragraph 70(10).

v) The ECJ in *The Front Comor* did not say that Professor Dr. Peter Schlosser's Report[37], which states[38] that

> "In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid ordering the parties not to continue with the arbitration proceedings, is not covered by the 1968 Convention"[39]

was to be disregarded as no longer good law. She relied upon the fact that this passage was cited in footnote 39 of the Opinion of Advocate General Kokott without disapproval, and also in *Van Uden, supra*.

vi) The ECJ in *The Front Comor* did not say that Mr P. Jenard's Report[40], which states:

> "The Brussels Convention …does not apply for the purposes of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration – for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings"[41]

was to be disregarded as no longer being good law.

vii) The ECJ in *The Front Comor* did not overrule the decision of the ECJ in *Van den Boogard*, or the principles enshrined in Article 48 of the Regulation. *Van den Boogard* remains binding authority requiring the court from which recognition is sought to distinguish between those aspects of a decision which relate to matters which are excluded from the Regulation and those which fall within it, and to decline to recognise or enforce the former.

viii) Paragraphs 53 and 54 of Advocate General Kokott's Opinion, to which reference is made in paragraph 26 of the judgment in *The Front Comor*, makes it clear that:

> "It can be left undecided here how proceedings which concern similar findings in the main case should be evaluated".

That remained the position and any comments in paragraphs 26 and 27 of the ECJ's judgment are purely *obiter* and are not binding on this court.

ix) Article 71 of the Regulation does not oblige the UK to breach its international obligations in the field of arbitration by recognising a judgment which disregards a valid arbitration clause. Nothing in the judgment of the ECJ in *The Front Comor* requires a contrary conclusion.

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37 Report on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of England and Northern Ireland to the Convention on jurisdiction and judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on 9 October 1978.

38 At paragraph 64(b).

39 Also quoted at paragraphs 70(5) and 70(7) of the judgment in *The Ivan Zagubanski*.

40 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels, 27 September 1968.

41 Official Journal 1979 C 59.

x) Nothing in *The Front Comor* judgment exonerates this Court from its duty under Article II of the New York Convention to decline to recognise a decision of the Almería Court which disregards the arbitration clause.

xi) Alternatively, even if the judgment of the Almería Court in relation to the relevant issues, were a Regulation judgment, it would be contrary to public policy for this Court to recognise it under Article 34(1) of the Regulation. It would be manifestly contrary to English public policy for this Court to give effect to the ruling of the Almería Court because (a) it would conflict with the public policy of enforcing agreements to arbitrate; (b) it would be directly contrary to the English court's duty under Article II of the New York Convention to recognise a valid arbitration agreement; and (c) it would enable Endesa to benefit from its own blatant disregard of the arbitration agreement and wrongful manipulation of the process in Spain (i.e. by depriving the Spanish court of a copy of the Voyage Charter) which led to its judgments of 31 July and 3 December 2008.

xii) In particular, the judgment on which Endesa relies was obtained in circumstances where Endesa had the power to produce the Voyage Charter, declined to do so, and persuaded the Spanish court that NNC's inability to produce the charter was fatal to NNC's jurisdictional challenge. The conduct of Endesa in denying the existence of the arbitration clause in the underlying Voyage Charter, when the overwhelming probability was that Endesa knew of the Carboex arbitration clause prior to the issue of the Bill of Lading was cynical and disreputable behaviour. It is conduct of a kind described by Dicey, Morris & Collins [42] which should result in the judgment not being recognised on the grounds of public policy.

Endesa's submissions

79. Mr. Lord's position, on behalf of Endesa, was that, because of the substantive nature of the dispute in Spain, the Spanish proceedings clearly fell within the Regulation. Accordingly, he submitted, it was not legitimate, as NNC sought to do, to carve out the Almería Court's decision on non-incorporation and waiver, in the context of NNC's jurisdictional challenge, so as to designate its decision on those issues as outside the Regulation, on the purported grounds that they fell within the arbitration exception contained in Article 1(2)(d). The key consideration was the substantive nature of the Spanish proceedings and it could not be (and was not) suggested that their principal focus was arbitration.

80. After delivery of the ECJ's judgment in *The Front Comor*, he additionally relied upon paragraphs 26 and 27 of that judgment to support his contention that the Almería Court's decisions, in relation to the two relevant issues, was a Regulation judgment. He further submitted that the decision of the Almería Court, being one within the Regulation, had therefore to be recognised in accordance with Article 33 of the Regulation. Such conclusion was not displaced by section 32(1) of the 1982 Act, as section 32(4) expressly provides:

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42 Paragraph 14-197.

> "Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of-
>
> (a) a judgment which is required to be recognised or enforced there under … the Regulation …."

81. He further submitted, in response to Ms. Selvaratnam's arguments, that:

i) *Da Costa* did not support the proposition that the *ratio decidendi* of an ECJ judgment was limited to the decision on the actual question referred;

ii) the decision in *Marc Rich* was on a much narrower point;

iii) the over-riding policy enshrined in the Regulation, as emphasised in *The Front Comor*, was that Member States have to trust other Member States who, after argument, have assumed jurisdiction;

iv) Article 35(3) of the Regulation made it clear that a decision on jurisdiction (which, he submitted, was the nature of the Almería Court's decision in relation to the arbitration agreement) could not be reviewed by another Member State on grounds of public policy or otherwise;

v) in the circumstances where, as here, the Almería Court had considered the question and held that there was no binding arbitration agreement, there could be no breach of this court's obligations under Article II of the New York Convention;

vi) in any event, even if this were wrong, the type of "manifest" public policy considerations implicit in Article 34(1) were not in play here, since all that NNC was really complaining about was that the Spanish court had decided the issue wrongly, not that its decision involved any flagrant breach of public policy; there was nothing that could be regarded as contrary to public policy in the Almería Court's decision not to receive the evidence of the Carboex Charter, or Endesa's refusal to provide it;

vii) accordingly, this Court was bound to recognise the judgments of the Almería Court that there was no valid or subsisting arbitration agreement between the parties, and, accordingly, should decline to make the declaration sought by NNC.

The effect of the ECJ's decision in *the Front Comor*

82. A preliminary question arises as to the binding nature of the ECJ's decision in *The Front Comor*.

83. I reject Ms. Selvaratnam's submission that I can disregard certain aspects of the ECJ's judgment in *The Front Comor* as not binding upon this court, on the grounds that they were not part of the *ratio decidendi* of the decision, or not strictly necessary for the purpose of answering the question posed by the House of Lords in its reference. The case of *Da Costa* is not relevant to the point and certainly does not support the proposition that the *ratio decidendi* of an ECJ judgment is limited to the decision on the actual question, or that the binding effect of such a decision was limited in any

other way. I was not referred by counsel to any European or English authority, to any text book, or to any article, to suggest that an English court could reject clear propositions of law in an ECJ judgment, on the grounds that they did not fall within the strict scope of the *ratio decidendi* of the decision. Indeed, the particularly common law distinction between *ratio decidendi* and *obiter dicta* would not appear to be a feature of any broad system of precedent in European private law[43].

84. Further, and in any event, the statement by the ECJ in paragraph 26 of its judgment that:

> "26. In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope."

and likewise in paragraph 27 that:

> "27. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation."

appear to be clearly part of the Court's *ratio* for its conclusion that the use of an anti-suit injunction to restrain proceedings within the Regulation, in another Member

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43 See, generally, *European Precedent Law*: Eric Tjong Tjin and Karlijn Teuben; European Review of Private Law 5 (2008) 827-841.

State, on the grounds that such proceedings would be contrary to an arbitration agreement, are incompatible with the Regulation.

Discussion and decision on issue (i)

85. Section 32 of the 1982 Act provides, so far as material, as follows:

> "**32. Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes.**
>
> (1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—
>
> (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
>
> (b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
>
> (c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.
>
> (2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.
>
> (3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).
>
> (4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of—

> (a) a judgment which is required to be recognised or enforced there under the 1968 Convention [or the Lugano Convention] [or the Regulation];
>
> …"

86. In the light of this provision, and the submissions of the parties, it appears to me that the following sub-issues arise for my determination under issue (i):

    i) Are the judgments of the Almería Court, in relation to the relevant issues, judgments within the Regulation, in the sense of being judgments given in civil or commercial matters?

    ii) If the judgments of the Almería Court are within the Regulation, does that mean that they are *prima facie* required to be recognised, pursuant to Article 33(1) of the Regulation, in proceedings in another Member State, which are *not* themselves proceedings within the Regulation, but rather proceedings *outside* the Regulation, by reason of the arbitration exception contained in Article 1(2)(d)?

    iii) If the Almería Court judgments are *prima facie* required to be recognised, pursuant to Article 33(1), for the purposes of section 32 of the 1982 Act, in proceedings outside the scope of the Regulation (viz. the Arbitration Action in the present case), is this court is entitled nonetheless to refuse to recognise the judgments pursuant to Article 34(1) of the Regulation on the grounds that such recognition would be manifestly contrary to public policy in the United Kingdom?

87. It was common ground that, if the Almería Court's judgments were not required to be recognised under the Regulation, Endesa could not, in the light of section 32(3) of the 1982 Act, rely on ordinary principles of *res judicata* and issue estoppel to contend that they were binding on this court under the common law.

Sub-issue (i): Are the judgments of the Almería Court, in relation to the relevant issues, judgments within the Regulation?

88. In my judgment, there can now be no doubt, that, in the light of the ECJ's judgment in *The Front Comor*[44], the Almería Court's judgments in relation to the two relevant issues, and the proceedings involving NNC's challenge to the jurisdiction of the Spanish court leading up to those judgments, have to be characterised as proceedings and judgments within the scope of the Regulation. Thus the judgments are *prima facie* qualifying judgments within the Regulation, as having been given in proceedings in civil or commercial matters. They are not within the arbitration exclusion contained in Article 1(2)(d).[45]

89. One might regard it as disappointing that, in coming to its conclusions (a) that the proceedings relating to the preliminary issue as the applicability and validity of the

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44 See in particular paragraphs 25-27 of the judgment.

45 See also the recent decision of the Court of Appeal in *Youell and Others v La Reunion Arienne and others [2009]EWCA Civ 175,* at paragraph 34.

arbitration agreement before the Italian Court were within the scope of the Regulation, and (b) that the anti-suit injunction granted by the English court was incompatible with the Regulation) the ECJ did not take the opportunity of explaining its reasons for rejecting certain previous views expressed by Mr Jenard and Professor Schlosser (as described in paragraph 75 above), and the compelling analysis of Advocate General Darmon in *Marc Rich*, as to the breadth of the arbitration exception now contained in Article 1(2)(d) of the Regulation, and for preferring[46] instead the views contained in the Evrigenis-Kerameus Report on the 1989 Accession Convention[47]. Likewise, from the academic perspective, given the significance of the issue and the controversy to which it has given rise[48], one might have preferred to see an analysis by the ECJ not only of the approach previously taken by that Court itself in *Marc Rich*[49] and *Van Uden*[50], and by the English and other national Courts in cases such *as Marc Rich, The Ivan Zagubanski, Through Transport* and *The Front Comor,* but also of at least some of the arguments rehearsed in numerous European academic articles on the topic. But, be that as it may, this court is bound by the ECJ's conclusions on these two issues.

90. Accordingly, I reject Ms. Selvaratnam's arguments that I should treat those parts of the Almería Court's judgments, which related to the relevant issues as severable from its decision to grant a stay under Article 27, and severable from the main proceedings, and that I should characterise those judgments as within the arbitration exception and therefore outside the scope of the Regulation. In the light of the decision of the ECJ in *The Front Comor*, they fall within its scope.

Sub-issue (ii): Does the fact that the judgments of the Almería Court are within the Regulation mean that they are *prima facie* required to be recognised, pursuant to Article 33(1), in proceedings in another Member State, which are *not* themselves proceedings within the Regulation?

91. This sub-issue was not specifically articulated in these terms in argument by counsel. I was not provided with any authorities or academic articles relating to the point.

92. The argument is that, notwithstanding that the judgments of the Almería Court are within the Regulation, they are not required to be recognised, pursuant to Article 33(1) of the Regulation, in proceedings in another Member State, which are *not* themselves proceedings within the Regulation. This is because, in the latter proceedings, the Regulation simply does not apply to the conduct of those proceedings.

93. It would appear that, in *The Front Comor,* the Tribunale di Siracusa had not, at any relevant date, delivered a judgment in respect of West Tankers' jurisdictional

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46 See paragraph 26 of the judgment in *The Front Comor* cited above.

47 The Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p.1).

48 See, by way of example, discussion of the issue and references to the various academic articles in The Conflict of Laws, Dicey, Morris & Collins, 14th Edition, (2006), at paragraphs 14-192-197; Civil Jurisdiction and Judgments, Briggs and Rees, 4th Edition, (2005) at paragraphs 7.08, 7.11, and 7.13; European Civil Practice, 2nd Edition, (2004), paragraphs 12.044- 12.055.

49 See, in particular, paragraphs 18, 26 and 29 of the ECJ's judgment in that case.

50 See, in particular, paragraphs 31-32 of the ECJ's judgment in that case.

objection to the Italian Courts on the grounds of an alleged arbitration agreement, so the issue of recognition in this context did not arise. However, in *Through Transport*[51], at the date of consideration by the English court, the Finnish Court had ruled that the party which had started the proceedings in Finland (New India) was not bound by a London arbitration clause, and that accordingly the P&I Club's jurisdictional challenge, on grounds of an arbitration agreement, fell to be dismissed. The Court of Appeal (consistently with the subsequent characterisation of the ECJ in *The Front Comor*) regarded the English Commercial Court proceedings (in which declarations and an anti-suit injunction were sought on the basis of an allegedly binding arbitration agreement) as proceedings outside the scope of the Regulation, and the Finnish proceedings as within the scope of the Regulation.[52] It held that, in those circumstances, there was no question of the English court declining jurisdiction or staying the proceedings under the Regulation, as the Regulation simply did not apply[53]. For similar reasons question of recognition of the Finnish judgment simply did not arise. In paragraphs 50 and 51, the Court stated:

> "50. A number of other questions which might arise under the Regulation were touched on in argument. In particular, there was some debate on the question whether the judgment of the District court of Kotka is entitled to recognition under Article 33. However, we do not think that this question arises for decision at present. As we understand it, the judgment obtained to date is simply to the effect that that court has jurisdiction to entertain a claim by New India under the Finnish Act. That was essentially a matter for that court in proceedings which seem to us to be within the Regulation. Whether that judgment is entitled to recognition or not does not seem to us to be relevant to the question whether the judge was correct to grant the declarations or injunction which he did.
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> 51. The fact that arbitration is excluded from the Convention means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise."

94. That approach, in my judgment, supports the argument that, although the judgments of the Almería Court are Regulation judgments, they are not required to be recognised, pursuant to Article 33(1) of the Regulation, in proceedings in another Member State, which are *not* themselves proceedings within the Regulation, because, in the latter proceedings, the Regulation simply does not apply. As the Court of Appeal pointed out in *Through Transport*, at this stage (and before any separate

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51 [2004] EWCA Civ 1598, in particular at paragraphs 13-15.
52 See paragraphs 47-51 and 83 of the Court of Appeal's judgment.
53 See paragraphs 21 and 49.

proceedings to enforce a substantive judgment of the Almería Court on the merits of the case), such a decision is no more than a decision as to that Court's jurisdiction to entertain Endesa's Article 5(1) claim.

95. The argument is further supported by the analysis of Advocate General Darmon, in paragraphs 88 – 90 of his opinion in *Marc Rich*[54] where he said:

> "88. The question whether or not an action comes within the scope of the convention is determined by its subject-matter. That is an objective criterion. In order to decide that the convention is applicable, it is necessary to establish that, *ratione materiae*, a dispute is, by virtue of its particular features, covered by the provisions of the convention. But in no circumstances can the existence of another action pending before another court entail the result that application of the convention is extended to the dispute concerned it if was not already covered by the convention by virtue of its subject-matter. Nevertheless, that is the view advanced by Mr. Jenard. That view might in fact lead to the conclusion that the *same* dispute would come within the scope of the convention if another action were pending before a court in another contracting state, but on the other hand would not be governed by the convention if the other proceedings did not exist. The applicability of the convention to a particular dispute cannot be made subject to variable geometry in that way.
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> 89. According to Mr. Jenard's opinion, the scope of the convention may be shaped to suit different situations in a purely opportunistic manner. For that purpose, it is only necessary to refer to its objectives in order to render it applicable to any dispute, whether or not the latter falls within its purview.
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> 90. Without doubt, the objectives of the Brussels Convention are of decisive importance for the interpretation of those provisions. But a mere reference to those objectives cannot justify neglect of the requirements of legal consistency or total disregard for the consequences which necessarily follow from the logic of the instrument but which are regarded as inconvenient.

96. I have given consideration as to whether the reasoning of the ECJ in *The Front Comor* (in particular at paragraphs 24 and 27 – 32), as to the incompatibility of an anti-suit injunction with the Regulation (notwithstanding that one set of proceedings is outside the Regulation, and the other within), requires a similar conclusion in relation to the

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54 [1991] 2 CEC at 387.

declaration sought by NNC that the arbitration clause in the Voyage Charter is validly incorporated into the Bill of Lading. The relevant paragraphs of the ECJ's judgment are as follows:

> "24. However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.
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> …
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> 27. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.
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> 28. Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.
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> 29. It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, *Gasser*, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C-351/89 *Overseas Union*

> *Insurance and Others* [1991] ECR I-3317, paragraph 24, and *Turner*, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (*Overseas Union Insurance and Others*, paragraph 23, and *Gasser*, paragraph 48).
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> 30. Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, *Turner*, paragraph 24).
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> 31. Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.
>
> 32. Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001."

97. In my judgment, the reasoning of the ECJ in those paragraphs does not predicate a similar conclusion in relation to the declaration sought by NNC. Taking in turn the objections raised by the ECJ:

    i) The granting of the declaration sought by NNC would not amount to any attempt by this Court "to strip… [the Almería Court] of the power to rule on its own jurisdiction under [the] Regulation". Nor would it amount to an attempt by this Court to interfere with that Court's "exclusive" right to rule on its own jurisdiction pursuant to Articles 1(2)(d) and 5(1). The purpose of the declaration sought by NNC is not to prevent or impede the Almería Court from assuming, or deciding upon, its own jurisdiction. The latter (subject to NNC's outstanding appeal) has already done so. Although Mance J (as he then was),

in *Toepfer International GmbH v Molino Boschi SRL*[55] regarded Toepfer's English proceedings (seeking a declaration that Molino was obliged to refer certain disputes to arbitration):

> "[i]n so far as it is to try to oblige or influence the Italian Court to accede to Toepfer's defence in Italy that the matter falls within a binding arbitration agreement, the object is to prevent the determination by the Italian Courts which it is Molino…'s aim in Italy to pursue..."

Toepfer was a case where the Italian Court had not yet ruled and an anti-suit injunction was also sought. Moreover, in the present case, the purpose and object of the declaratory relief, as distilled from Ms. Selvaratnam's submissions and all the circumstances, would appear to be:

a) to allow the arbitration to proceed in London;[56];

b) if the arbitration results in an award in NNC's favour, to enable NNC to enforce the award in jurisdictions other than Spain; and

c) at a later stage, to assist in NNC's resistance of the enforcement of any Spanish judgment in Endesa's favour in the United Kingdom, by reference to Article 34(3).

Whether any of those objectives would, or could, be achieved, or assisted, by the grant of the declaratory relief, is not for me to consider at this stage and I was not asked to do so. But in my view, any declaration granted by this Court would not threaten or impede or otherwise obstruct any decision by the Spanish court as to its own jurisdiction. The decision of this court as to the arbitration issues would appear unlikely to have even any persuasive effect on the Spanish appeal court hearing NNC's appeal against its jurisdictional challenge; to date, the Almería Court has regarded the question as one of Spanish procedural law and has applied Spanish law to the question. If, on appeal, the relevant Spanish court, contrary to the view of the Almería Court, were to consider that English law were indeed relevant, it would have the assistance of this Court's decision on the arbitration issues. Accordingly, I see no conflict with the decision in *The Front Comor* in this respect.

ii) In making a declaration, the English court would not be "reviewing" the jurisdiction of the Almería Court, or determining whether that court had jurisdiction, so as to offend the principles described in paragraph 29 of the judgment of *The Front Comor*. All the English court would be doing would be deciding, in compliance with its obligations under Article II of the New York

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55 [1996] 1 Lloyd's Rep. 510, at 513.

56 I was told that the arbitrator has indicated that he will proceed with the arbitration hearing, in the event that there is a declaration from this court as to the existence of a binding arbitration agreement and that he was content that such an application should proceed before this court; accordingly no issue under section 32 of the Arbitration Act 1996 was raised before me.

Convention, whether there was a subsisting arbitration agreement between the parties; and, if so, referring the parties to arbitration[57].

iii) Nor would any such declaration of the English court prevent the Almería Court from exercising its substantive jurisdiction under Article 5(1) in relation to Endesa's claim in the Spanish proceedings, or, indeed, bar or restrain Endesa from pursuing its Article 5(1) claim before the Almería Court – the mischief referred to in paragraph 31 of the judgment in *The Front Comor.*

iv) With some hesitation, I have also concluded that the granting of a declaration would not come within the mischief broadly stated in paragraph 30 of the ECJ's judgment in relation to anti-suit injunctions; viz. as being something that would run "counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based". As Advocate General Darmon pointed out in his opinion in *Marc Rich*[58]:

> "Harmonisation of the solutions adopted by national courts does not constitute an aim in itself, at the expense of the specific features of the area concerned."

He then went on to explain[59] that, necessarily, where one set of proceedings is outside the Regulation, there will always be a risk of conflicting judgments in different Member States in relation to issues such as those under consideration in the present case. This consequence was similarly recognised by the Court of Appeal in *Through Transport*[60], by the House of Lords in *The Front Comor*[61], and by Advocate General Kokott in her opinion in *The Front Comor*[62]. As Staughton J (as he then was) pointed out in *Tracomin SA v Sudan Oil Seeds Co Ltd (No1)*[63], there is a recognised difference between the approach of the common law and that of certain civil law jurisdictions to attempts to incorporate an arbitration clause into a contract. That difference of approach, however, should not deter a court that has jurisdiction, outside the system of allocation of court jurisdictions which the Regulation creates, to protect what it regards as the contractual right of a party to have its dispute determined by arbitration in that Member State.

v) Thus, given that arbitration actions within Article 1(2)(d) are not part of "the system of jurisdiction under [the Regulation]", as described by the ECJ in *The Front Comor,* there can, in my judgment, be no assumption, in circumstances where different Member States have their separate and respective obligations under the New York Convention, that one Member State will be in a position to accept, or should, on grounds of comity, accept, the decision of the court of another Member State, as to the incorporation or validity of an arbitration clause, in circumstances where the latter may well have applied its own law to

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57 See Dicey, Morris and Collins, *op. cit.* at paragraph 14-198, footnote 53.
58 At paragraph 76.
59 At paragraphs 102- 104.
60 *Supra*, at paragraph 51.
61 *Supra*, at paragraphs 14-16.
62 *Supra*, at paragraph 70.
63 [1983] 1 Lloyd's Rep 560 at 562.

the question. In other words, the position in relation to a declaration – which is not interfering with the exercise by another Member State of the exercise of a Regulation jurisdiction – is different from that in relation to the grant of an anti-suit injunction.

vi) Accordingly, I hold that the judgments of the Almería Court are not required to be recognised, pursuant to Article 33(1) of the Regulation, in the Arbitration Action in this Court, since the latter proceedings are outside the scope of the Regulation, by reason of the arbitration exception contained in Article 1(2)(d).

Sub-issue (iii): If the Almería Court judgments are prima facie required to be recognised pursuant to Article 33(1), is this Court entitled nonetheless to refuse to recognise the judgments pursuant to Article 34(1) of the Regulation on the grounds that such recognition would be manifestly contrary to public policy in the United Kingdom?

98. If I am wrong in the conclusion which I have reached above, and the Almería Court's judgments are *prima facie* required to be recognised in the Arbitration Action, notwithstanding that the latter is an action outside the Regulation, then the further sub-issue arises as to whether this Court entitled nonetheless to refuse to recognise the judgments pursuant to Article 34(1) of the Regulation on the grounds that "such recognition would be manifestly contrary to public policy" in the United Kingdom.

99. Again, this is a vexed question, even following the ECJ's decision in *The Front Comor*, characterising the preliminary jurisdictional objection based on an alleged arbitration agreement, and, consequently, any judgment of the Italian Court on that issue, as proceedings within the Regulation. The topic has been the subject of considerable academic debate; see, by way of example, Dicey, Morris & Collins[64] and Briggs & Rees[65]. In *Philip Alexander Securities and Futures Limited v Bamberger and Others*[66], Waller J (as he then was) expressed the view (*obiter*) that a ruling of a foreign court in a Member State, as to the invalidity of an arbitration agreement, should not have to be recognised by the English court, irrespective of whether the ruling was obtained from the foreign court at a preliminary stage or at the stage of the substantive determination of the dispute, and notwithstanding that the foreign court's ruling was a Convention (now a Regulation) judgment. He reached that conclusion on the basis that it would be contrary to English public policy to recognise a judgment obtained in breach of an arbitration agreement that was valid by its proper law. He took the view that the prohibition in Article 27(3) of the Convention (corresponding to Article 35(3) of the Regulation), that the jurisdiction of the foreign court could not be reviewed on the grounds of public policy was not engaged, since the English court was not reviewing the jurisdiction of the foreign court on grounds of public policy, but rather marking its disapproval of a breach of contract[67]. The approach of Waller J is approved by the commentary in both Dicey, Morris & Collins and in Briggs & Rees, in those passages cited above, albeit (obviously) without consideration of the subsequent decision of the ECJ in *The Front Comor.*

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64 *Op cit.* at paragraphs 14-194 – 197.
65 *Op cit.* at paragraph 7.13, in particular at page 508.
66 [1997] I.L.Pr. 73, at paragraphs 111 -114.
67 The Court of Appeal in the same case took the view that none of the arbitration agreements were enforceable, so it did not have to consider these issues.

100. The issue was also referred to in passing, although not determined, by Tomlinson J in the recent case of *DHL GBS (UK) Limited v Fallimento Finmatica Spa*[68] , a judgment given after the decision in *The Front Comor*.

101. In my judgment, and with some degree of hesitation, I conclude that it would be manifestly[69] contrary to the public policy of the United Kingdom to recognise the Almería Court's judgments in relation to the non-incorporation of the arbitration agreement and the alleged waiver of any agreement.

102. My reasons for that conclusion may be summarised as follows:

i) I agree with the view of Waller J, expressed in *Philip Alexander Securities and Futures Limited v Bamberger and others,* that it would be contrary to English public policy to recognise a judgment obtained in breach of an arbitration agreement that was valid by its proper law.

ii) There is clear statutory and conventional obligation under English law for an English court to give effect to an arbitration agreement that is valid in accordance with its proper law: see section 9(4) of the Arbitration Act 1996; Article II of the New York Convention; and section 32 of the 1982 Act. Article II of the New York Convention provides that:

> "Each Contracting State shall recognise an agreement in writing under which parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

I accept NNC's submission that, if this Court were not able to give effect to a binding arbitration agreement that is valid in accordance with its proper law, that would be a contravention of the United Kingdom's obligations under the New York Convention, a contravention of section 9(4) of the 1996 Act, and thus contrary to public policy.

iii) In the present case, (on the assumption that there was a binding and valid arbitration agreement), the breach of contract on the part of Endesa lay in not agreeing to submit its dispute to arbitration, at the latest by the time NNC had challenged the jurisdiction of the Almería Court to decide the substantive dispute between the parties.

iv) This court is not (for the reasons already given in paragraph 97.ii) of this judgment) reviewing the Almería Court's decision to take jurisdiction. That decision, according to the judgment dated 3 December 2008, appears to have been primarily based (a) on the procedural decision that there had been no application by NNC to apply for a stay on the grounds of an arbitration agreement[70]; and (b) that, in any event, the effect that arbitration may have on

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68 [2009] EWHC 291 at paragraphs 21-23.

69 The word "manifestly" did not appear in the previous Conventions. It is difficult to see what, if any, requirement it adds.

70 See paragraph 2.

judicial proceedings, was a procedural decision that had to be decided exclusively in accordance with Spanish law[71]. Given this court's views as the proper law (as to which see below), there is no question of this court examining issues of Spanish law, or the Spanish court's application of Spanish law.

v) Paragraph 33 of the ECJ's judgment does not undermine this conclusion. The obligation in Article II(3) is imposed upon *each* Contracting State which "is seized of an action in a matter in respect of" an arbitration agreement. The Arbitration Action is such an action. As Leggatt LJ remarked in the course of his judgment in *The Angelic Grace*[72] in relation to Article II(3):

> "It seems to me, however, that that provision does not confer an exclusive jurisdiction on the Court of the Contracting State concerned; and it is consonant with that provision that the Court of another Contracting State should make an order procuring the same result."

103. However, contrary to NNC's submissions, I do not regard Endesa's conduct in relation to non-disclosure or non-production of the Voyage Charter before the Almería Court, as providing, in this context, the basis for any public policy considerations. I do not consider, on the evidence before me, that there was any "manipulation" by Endesa of the court process. NNC could have made an urgent application for disclosure and production of a copy of the Voyage Charter for use in the Spanish proceedings much earlier than it did. It could, with due diligence, have obtained a translation of the Carboex Supply Agreement (which contained a specific reference to the relevant charter) much earlier than it did. Finally, the Almería Court did indeed consider whether the Voyage Charter affected its decision in its earlier judgment, and apparently concluded, by its ruling of 29 December 2008, that it did not do so.

104. Accordingly I am not required to recognise the Almería Court's judgments, in relation to the issues of incorporation and waiver of the arbitration agreement, under the Regulation and it follows that, pursuant to section 32 of the 1982 Act, I am not bound by its decision in relation to those issues. I have to decide for myself the issue whether the arbitration clause here was validly incorporated in the contract between the parties, and, whether, by starting the Commercial Court Action, or otherwise, NNC waived or repudiated any arbitration agreement. As the authors of Civil Jurisdiction and Judgments[73] point out[74], the section precludes the possibility of either party relying on the previous decision of a foreign court as an issue estoppel.

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71 See paragraph 5.
72 [1995] 1 Lloyd's Rep. 87 at 94.
73 Professor Adrian Briggs and Peter Rees: 4th Edition, 2005.
74 At paragraph 7.48, footnote 422.

Issue (2): Is Spanish or English law the proper law to apply to the question as to whether the arbitration agreement had been incorporated into the Bill of Lading incorporation issue and the waiver/ repudiation issue?

Endesa's submissions

105. Mr. Lord made detailed submissions supporting Endesa's contention that Spanish law was the proper law to apply to the incorporation and waiver/repudiation issues, including:

i) that the concept of the proper putative law governing the incorporation of an arbitration agreement should have no application where, as here, the Bill of Lading contract was valid in itself, and the question was rather whether a term of one of the two other contracts is incorporated in it; the starting point should be the Bill of Lading in the absence of any incorporated clause;

ii) that the correct law to apply was Spanish law, as it had the closest connection with the Bill of Lading;

iii) that Article 4(1) of the Rome Convention[75] applied, since the construction of the Bill of Lading was not a matter that had arbitration as its principal focus.

NNC's submissions

106. Ms. Selvaratnam submitted that, applying the principles set out in Dicey, Morris & Collins[76] at Chapter 16, paragraphs 16-R-001 to 16-26, English law applied to the question of incorporation (and therefore waiver) as the putative proper law of the arbitration agreement.

107. In my judgment, whether one approaches the matter by considering what is the proper law of the Bill of Lading, or by considering the putative law of the arbitration agreement, the correct answer is that English law is the applicable proper law to decide the issue of incorporation. As the editors of Dicey, Morris & Collins[77] state, at paragraph 16-016, in most cases, the correct solution will be found in the construction of the agreement as to the parties' choice of law; autonomy of choice is clearly preserved by the Rome Convention: see Article 3, even on the assumption that it were applicable at all to the first approach, given the exclusion of arbitration agreements from its scope under Article 1(2)(d).

108. Here, the Bill of Lading, as one of its conditions of carriage, expressly provided that "the Law and Arbitration Clause" of the relevant charter party were incorporated into the Bill. The Head Charter had an express choice of English law, and the Voyage Charter had an implied choice of English law[78]. Thus, construing the Bill of Lading on any rational commercial basis, one must conclude that the parties to the Bill of

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75 The Convention on the law applicable to contractual obligations 1980, signed by the United Kingdom on 7 December 1981, and given the force of law in the United Kingdom by the Contracts (Applicable Law) Act 1990.

76 *Op cit*.

77 *Ibid*.

78 See *Compagnie Tunisenne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 573 at 609, per Lord Diplock; *Egan Oldendorff v Liberia Corp (No 2)* [1996] 1 Lloyd's Rep 380 at 390, per Clark J (as he then was); Dicey, Morris & Collins, *op cit* at paragraph 32-994 to 32-097.

Lading intended that English law would govern the contract of carriage evidenced by the Bill of Lading. So, whether it is correct to approach the incorporation issue on the basis of the proper law governing the Bill of Lading contract, or on the basis of the putative law of the arbitration agreement (as a separate contract), English law applies to that issue. That conclusion is consistent with *The Parouth*[79] and *The Atlantic Emperor*[80], which are binding on me. I see no reason to distinguish them.

Issue (3): Applying English law as the proper law, was the arbitration clause, in either the Voyage Charter or the Head Charter, incorporated into the contract between NNC and Endesa?

109. In the present case, the Bill of Lading does not identify the charter whose terms are to be incorporated. As Mr. Lord accepted, it is well-established that where a bill of lading purports to incorporate a charter, but fails to identify its date or other details of the charter concerned, that is not fatal to the incorporation of the charter if it can otherwise be properly identified: see *The San Nicholas*[81]; and *The SLS Everest*[82]. Even in circumstances where there are two or more potentially relevant charters, the courts are very reluctant to hold that the contract is void for uncertainty, as this does not give effect to the obvious intention of the parties that the terms of a charter are to be incorporated, *The San Nicholas*[83] and *The Sevonia Team.*[84]

110. Although the general rule is that the head charter, to which the shipowner is party, is incorporated[85] the position may well be different where, as here, the head charter is a time charter, on the basis of the presumed unlikelihood of the parties wishing to incorporate the terms of a time charter which are different in kind.[86] As stated in Carver on Bills of Lading[87]:

> "There is no easy answer to the problem raised by the cases of the kind here under discussion. The only general statement which can safely be made about them is that where the courts have to choose between two or more charterparties, they will be inclined to favour the incorporation of terms of that charter which are the more (or the most) appropriate to regulate the legal relations of the parties to the bill of lading contract. Where each (or more than one) of the charterparties is equally appropriate for this purpose, the courts might determine the issue by holding the relevant charterparty to be that one which governed the contractual relations between the original parties to the bill of lading and in pursuance of which the bill was issued." (Emphasis added.)

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79 [1982] 2 Lloyd's Rep 351, CA.
80 [1989] 1 Lloyd's Rep548 per Hirst J at pages 552-553; subsequently approved by the Court of Appeal at p 544.
81 [1976] 1 Lloyd's Rep 8.
82 [1981] 2 Lloyd's Rep 389 at 392 per Lord Denning, MR.
83 *Supra*, at 11.
84 [1983] 2 Lloyd's Rep 640 at 644, per Lloyd J (as he then was).
85 *The San Nicholas*, *supra*, at 11; *The Sevonia Team*, *supra*; and *Bills of Lading* (Aikens, Lord and Bools), 2006, paragraph 7.104.
86 *Bills of Lading*, *op cit* at paragraph 7.115.
87 2nd Edition, 2005 at 3-026, pages 91-92.

111. There was no suggestion by either party that the sub-time charter to Morgan Stanley (no doubt for financing purposes) was relevant. In my judgment, the more appropriate candidate for incorporation here is the Voyage Charter, for the following reasons:

i) the Head Charter is a time charter, many of the terms of which would not be relevant in the context of the Bill of Lading contract;

ii) the Voyage Charter is a contract of affreightment on voyage charter terms, for the carriage of the coal from the loading port in Indonesia to Ferrol (alternatively, Carboneras); and

iii) the "corresponding charter party", as referred to in clause 6 of the Carboex Supply Agreement, must have been intended to have been a reference to the charterparty to which Carboex was itself a party as charterer of the vessel carrying the coal, viz. the Voyage Charter. Accordingly, Endesa should be taken to have been accepting the application of the terms of the Voyage Charter where appropriate.

112. But, even if the Head Charter were the relevant charter, the Bill of Lading, on either basis, is subject to a London arbitration clause and English law.

Issue (4): Applying English law, did NNC waive or repudiate the arbitration agreement by issuing the Commercial Court Action?

113. It was common ground between Mr. Lord and Ms. Selvaratnam that the law relating to the repudiation of an arbitration agreement (on the assumption that English law is the proper law to apply) was as set out in *Chitty on Contracts*[88]:

> "If, contrary to an agreement to refer a matter to arbitration, one party resorts to legal proceedings in an English court in respect of that matter, the court has jurisdiction to hear the dispute. The existence of the arbitration agreement, or even the fact that an arbitration is already in progress, affords no defence to the action. The appropriate course is for the other party to apply for a stay of the legal proceedings. Conversely, there is no principle that requires arbitral proceedings to terminate if a party to the arbitration resorts to legal proceedings. Nor does resort to legal proceedings of itself constitute a repudiation of the arbitration agreement. However, where one party denies that he is bound by the arbitration agreement and thereby repudiates it, the issue of legal proceedings by the other party may amount to an acceptance of the repudiation and so bring the agreement to an end. It there are concurrent or overlapping proceedings in respect of the same matter, both in arbitral and legal proceedings, the court may grant an injunction to restrain the continuance of the arbitral proceedings. But it will not necessarily do so and may allow them to continue. Yet in such a case it would seem that an award in concurrent proceedings

[88] 29th Edition, 2004, as set out in paragraph 32.041.

without the consent of both parties would then have no effect." [Emphasis added]

114. It followed that it was also common ground that the following summary by Mr. Askins[89] correctly stated the position:

> "72. It is clear from English case law that proceeding both before the Courts and by way of London arbitration in respect of the same dispute is not by itself a renunciation of the arbitration agreement:
>
> (1) The mere issue of proceedings in a foreign court in respect of a London arbitration clause does not amount to a repudiation or renunciation of the arbitration agreement: *The Mercanaut* [1980] 2 Lloyd's Rep 183 (Lloyd J);
>
> (2) The mere issue of a High Court claim form does not involved the automatic termination of an arbitration or amount to a repudiation of the arbitration agreement itself and the two sets of proceedings may run concurrently: *Lloyd v Wright* [1983] 3 WLR 223 (Court of Appeal);
>
> (3) The mere issue of a cross-claim in High Court proceedings against another party to the arbitration agreement does not amount to a renunciation or repudiation of the arbitration agreement itself: *The Golden Anne* [1984] 2 Lloyd's Rep 489 (Lloyd J);
>
> 73. For there to have been a renunciation of the arbitration agreement requires proof of clear and unequivocal conduct establishing a repudiation of the arbitration agreement: *The Golden Anne* per Lloyd J at 494.
>
> 74. Such conduct is not lightly to be inferred: *The Mercanaut* per Lloyd J at 185.
>
> 75. Moreover, any repudiation must be accepted by the other party to the arbitration agreement if the agreement to arbitrate is to come to an end: *The Mercanaut* per Lloyd J at 185.
>
> 76. Yet further, as the mere issue of court proceedings (whether before the English courts or abroad) is not itself sufficient to establish repudiation of the

[89] Paragraphs 72 – 77 of Mr. Askins affidavit dated 25 September 2008 in the Spanish proceedings.

> arbitration agreement, regard must be had to the subsequent conduct of the party alleged to have repudiated the arbitration agreement in order to ascertain whether the Court proceedings do in fact amount to a renunciation of the arbitration agreement (that is to say, a clear and unequivocal intention not to be bound by the arbitration agreement).
>
> 77. It was for this reason that in *The Mercanaut* Mr. Justice Lloyd held that the issue of a protective write in a foreign jurisdiction did not amount to a renunciation of the arbitration agreement where subsequently the party issuing that writ made clear that it was (i) a protective writ; and (ii) indicated a continuing intention to be bound by the arbitration agreement."

115. As Mr. Lord submitted, the crucial question is whether an objective observer would conclude that NNC had evinced to Endesa an intention not to be bound by the arbitration agreement.

116. Mr. Lord contended that an objective observer would conclude that NNC had evinced an intention to repudiate any arbitration agreement. In support of this he submitted as follows:

i) After Endesa commenced proceedings before the Almería Court, NNC's first, and for a long while only, response was to institute proceedings in the Commercial Court.

ii) The claim form in the Commercial Court Action did not evince any intention to rely on any arbitration agreement and did not refer to any arbitration agreement or arbitration claim. Rather, NNC asked the Commercial Court to settle the question of liability.

iii) No adequate explanation had been given by NNC for commencing the Commercial Court action. This is highly relevant, as held by Cooke J in *Bea Hotels NV v Bellaway LLC*[90]. In the authorities to which Mr. Askins referred (the *Golden Anne*[91] and the *Mercanaut*[92]), there was an adequate explanation for the allegedly repudiatory action.

iv) Accordingly, the objective observer would believe (as would Endesa) that NNC had repudiated any agreement to arbitrate.

v) Further, the cases cited by Mr. Askins were readily distinguishable: in the *Golden Anne*, the conduct allegedly evincing an intention not to be bound by the arbitration agreement was essentially a "neutral act" involving a cross-claim after another party had brought the party alleging repudiation into the

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90 [2007] EWHC 1363 (Comm), [2007] 1 CLC 920.
91 *Supra.*
92 *Supra.*

litigation.[93] Likewise, in the *Mercanaut* the allegedly repudiating party had commenced arbitration on the same day that it issued its writ and it was clear that an objective observer would conclude that there was no intention to abandon/repudiate the arbitration agreement. In the present case however, there was no adequate explanation for commencing the Commercial Court Action and for failing to commence arbitration proceedings in parallel or in the alternative.

vi) He also submitted that the repudiation had been accepted by Endesa, not least by Endesa's filing its own submissions on the merits before the Almería Court, and in particular making the points made as to waiver of the arbitration agreement. That repudiation could not be undone or refuted by NNC's submissions when addressing Endesa's challenge to the jurisdiction of the English court. As held by Cooke J in *Bea Hotels*: "conduct after the alleged acceptance of the repudiation is irrelevant".[94] NNC's repudiation was accepted prior to its submissions to this court. Accordingly, NNC have repudiated the agreement to arbitrate, and must defend Endesa's claim before the Spanish courts.

117. In my judgment, NNC has not demonstrated such clear and unequivocal conduct by its institution and prosecution of the Commercial Court Action as to amount to repudiation of any arbitration agreement between the parties. Despite my criticisms of the lack of transparency in relation to the claim form in the Commercial Court Action, the fact is that, at that stage, NNC had not been supplied with a copy of the Voyage Charter and it was, through no fault of its own, operating in the dark to some extent. Moreover, although, as I have already described, NNC's position in the Spanish proceedings, and in the two sets of English proceedings, was confusing as to precisely what its case was as to jurisdiction, there can be little doubt that, at all material times, Endesa, at least, was under the impression that NNC, both in the Spanish proceedings and elsewhere, was indeed maintaining its contention that the correct forum for resolution of the dispute (or at least a possible correct forum) was London arbitration. This is clear from Mr. Alegre's first witness statement dated 12 May 2008, in particular paragraphs 8-12, 15-16 and 22. Notwithstanding Endesa's contention before the Almería Court that, by commencing the Commercial Court Action, NNC had waived such rights to arbitration as it had, the description in Mr. Alegre's witness statement of NNC's conduct does not demonstrate clear unequivocal conduct evincing an intention not to be bound by the arbitration agreement. On the contrary, as that witness statement describes, NNC, at all times, was persisting in its submission that London arbitration was, or at least might be, the contractually agreed jurisdiction. Moreover, the communications between Mr. Alegre and Mr. Askins in the period January to May 2008, leading to the issue of NNC's Disclosure Application on 10 June 2008 did not demonstrate any such "clear unequivocal conduct" or intention not to be bound by the arbitration clause; see, for example, Mr. Askins' email to Mr. Alegre dated 27 May 2008 at 18:19, which stated:

> "A simple confirmation of the existence of the jurisdiction regime in the voyage charter would allow us to take

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93 *The Golden Anne*, page 495 col 1.

94 *Supra*, at page 26.

> instructions on withdrawing the High Court application if in fact the matter is subject to Arbitration."

118. Accordingly, I reject Mr. Lord's submission that an objective observer would, in the circumstances, have concluded that NNC had evinced an intention not to be bound by the arbitration agreement.

Issue (5) Should this court, as a matter of discretion, grant a declaration as to incorporation that conflicts with a judgment by a court of another Member State?

119. Mr. Lord contended that I should not, as a matter of discretion, grant a declaration that conflicted with the judgments of the Almería Court, which had already decided that there had been no such incorporation of the arbitration clause. To do so, he submitted, would offend notions of comity, particularly in circumstances where NNC had allowed the Almería Court to proceed to judgment and in the light of the ECJ's judgment in *The Front Comor*. He also submitted that I should not grant a declaration on grounds of (a) NNC's abuse of process in connection with the Commercial Court Action and (b) NNC's delay.

Comity

120. In my judgment, principles of comity should not prevent this court from exercising its discretion to make the declaration sought by NNC. I have already expressed my views as to why, notwithstanding the decision in *The Front Comor,* the grant of such a declaration would not be incompatible with the Regulation. As I have already said, the fact that arbitration is excluded from the scope of the Regulation means that, from time to time, there are likely to be conflicting judgments in different Member States in relation to "arbitration" issues such as those under consideration in the present case.

121. The factual circumstances of the case do not appear to me to give rise to any additional reasons as to why such a declaration would offend notions of comity between Member States. The Almería Court, in its judgment dated 3 December 2008,[95] clearly recognised that its decision would not be binding on this court, and that this court might well decide the incorporation and waiver/repudiation issues under English law in an opposite manner from that in which the Almería Court had decided such issues as a matter of Spanish law. Moreover, the Almería Court emphasised that it had "only rejected submission to an arbitration clause on the grounds of form", although it went on to add: "… and on the basis of basic legal grounds …[96]". The substantive proceedings in Spain have not got very far; there is still an appeal outstanding on NNC's jurisdictional challenge, which, as I understand it, will now proceed once the Commercial Court Action has been struck out and if, and when, the stay granted by the Almería Court is lifted.

Abuse of Process

122. I do not consider that NNC's conduct in bringing the Commercial Court Action (which I have already criticised and marked by an order for indemnity costs in earlier paragraphs of this judgment) would be a sufficient reason to deprive it of its

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95 Paragraph 4.
96 Paragraph 4.

entitlement to a declaration in the Arbitration Action, if I were of the view that it was otherwise entitled to one. In my judgment, that would be a disproportionate sanction for NNC's conduct in connection with the Commercial Court Action.

Delay

123. The principal submissions made by Endesa in relation to delay were in the context of NNC's application for an anti-suit injunction where Endesa relied upon NNC's delay from 23 January 2008 (when the Commercial Court Action was started) until 5 September 2008, which was the date on which NNC for the first time applied for an urgent interim anti-suit injunction. (Upon the adjournment of that application to 29 October 2008, it was agreed between the parties, as reflected in a consent order made by me on 22 September 2008, that Endesa was not entitled to rely on any delay after 5 September 2008.) No separate submissions were made in relation to the Declaration Application, which was issued on 8 July 2008 as part of the substantive relief sought by NNC in Folio 667. Accordingly any relevant delay in relation to that application would only be from January to July 2008.

124. The authorities show that, in a case such as this, I have a wide discretion even in relation to the grant of a declaration. However, whilst I take the view that NNC could, on the basis of the information available to it in January 2008 about the existence of an arbitration clause, have issued the Arbitration Action, applied for urgent disclosure of the Voyage Charter and applied for a declaration at a much earlier stage, the reality is that part of the real problem facing NNC was that it did not have a copy of the Voyage Charter, albeit that it did have a copy of the Head Charter. That it did not have such a copy (prior to any disclosure application being made) was due to Endesa's refusal to provide NNC with such a copy. Endesa was at all material times, from a practical point of view, clearly able to obtain a copy of the Voyage Charter from Carboex (given that it was a co-subsidiary and Endesa's rights under the Carboex Supply Agreement), and indeed had done so, since a copy had been forwarded to Endesa's leading and previous junior counsel (although this was said to be have been in error). I go on to explain, later in this judgment, why I ordered Endesa to disclose a copy of the Voyage Charter, but for the purposes of the issue of delay, I take into account the fact that NNC's lack of knowledge as to the precise terms of the arbitration clause was at least to a certain extent due to Endesa's refusal to provide a copy of the Voyage Charter.

125. In retrospect, I consider that NNC could, given the knowledge available to it, have started the arbitration proceedings coupled with an application for disclosure of the Voyage Charter, and an application for a declaration as early as January or February 2008, and certainly in June 2008, after Mr. Alegre, in his second witness statement[97] in Folio 64, dated 24 June 2008, had stated that:

> "… the only evidence (as opposed to speculation concerning the … Carboex charter party … indicates it contains a London arbitration clause."

126. However, although I consider that there has been unnecessary (and in that sense, culpable) delay in issuing the application for a declaration, I do not consider that it is

[97] In paragraph 24.

so serious, or has caused any real prejudice to Endesa, such as to deprive NNC of the declaratory relief to which I consider it is otherwise entitled. The facts are that NNC was entitled to mount the jurisdictional challenge to the Spanish proceedings (and, as I have said, Endesa do not rely on that challenge as evidence of delay), that the Spanish proceedings have not gone beyond the jurisdictional stage, and indeed are currently stayed pending Endesa's jurisdictional challenge to the Commercial Court Action; and Endesa is, in my judgment, in breach of its obligations under the arbitration clause to submit its disputes under the Bill of Lading to London arbitration.

127. Accordingly, I propose to grant the Declaration in the terms sought by NNC, namely:

> "The London arbitration clause of a Charterparty dated 25 September 2007 and made between Morgan Stanley Capital Group Inc as disponent owners and Carboex SA as charterers of the vessel WADI SUDR ('the Carboex charter') is validly incorporated into the Bill of Lading no.CIL 07/49 dated 6 December 2007 issued by the Claimant in respect of a cargo of 64,609MT steam coal in bulk shipped at Indonesia aboard the said vessel ('the Bill of Lading') and is binding upon the Defendant. [The costs of and occasioned by that application are to be paid by Endesa (on a standard/indemnity basis) and referred to a detailed assessment]."

128. It follows that I also dismiss Endesa's Jurisdiction Application in the Arbitration Action.

The Disclosure Application

129. My reasons for making my order dated 21 November 2008[98] for disclosure of the Voyage Charter may be shortly stated as follows.

130. As I have concluded above, it was clearly the intention of NNC and Endesa, as effective parties to the contract of carriage reflected in the Bill of Lading, to submit their disputes to arbitration as per the terms of the relevant charter party. For disclosure purposes, a party can only be required to disclose a document if the court takes the view that it is in its "control", as that term is defined in CPR 31.08.

131. Under English law (and despite the fact that, notwithstanding the CPR, the decision in *Lonrho Limited v Shell Petroleum Co Limited (No 1)*[99] remains good law), the legal analysis as to whether a document is within the control of a party has to be seen in the light of the factual position as to whether the document is indeed in the control of the party.[100] The position here, factually, was that a copy of the document, supplied by Carboex, had been in Endesa's possession, in that it was in the possesion of its solicitors and counsel[101]. It is unreal to suppose that Endesa could not have obtained a further copy from Carboex, if it had chosen to do so. Moreover, I accept the evidence as to Spanish law, given in the third witness statement of Pedro Maura, dated 10 November 2008 that, under the provisions of clauses 6 and 9 of the Carboex Supply

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98 See paragraph 43, above.
99 [1980] 1 WLR 627.
100 Hollander: *Documentary Evidence*, 9th Edition, 2006, at page 158.
101 Although its provision was said to have been "a mistake".

Agreement, Endesa had the contractual right to call upon Carboex for the provision of a copy of the Voyage Charter, which, by necessary inference, was referred to in those clauses. That, in my judgment, is sufficient on its own to satisfy the requirement of "control" specified in CPR Part 31.08. The evidence to the contrary of Endesa's Spanish lawyer, David Navarro di Palencia, is not persuasive in its analysis of the contractual issue.

132. NNC wished, for legitimate reasons, to have a copy of the Voyage Charter for use in the Spanish proceedings, and the terms of the contractual undertaking which it had given to Carboex to obtain a copy of the charter did not permit it to use that copy in those proceedings. However, I did not consider it appropriate to order Endesa not to oppose the use of the document in the Spanish proceedings as I considered the admission or non-admission of the Voyage Charter was a procedural matter for the Almería Court to decide.

Conclusion

133. It follows that I find in NNC's favour in relation to its Declaration Application. I will hear any further argument from counsel as to the precise terms of the order and as to the costs of the Arbitration Action, given that I have acceded to NNC's Declaration Application and refused its Anti-Suit Application.