Case No: A3/02/2230
A3/02/2231

[2003] EWCA Civ 938

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COMMERCIAL COURT
MR. JUSTICE DAVID STEEL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3RD July 2003

Before :

LORD JUSTICE BROOKE
LORD JUSTICE MAY
and
LORD JUSTICE TUCKEY

- -

Between :

- -
- -

Graham DUNNING Q.C. and Ricky DIWAN (instructed by **Stephenson Harwood**) for the Appellants
Karen TROY-DAVIES (instructed by **Brookes & Co.**) for the Respondent

Hearing dates : 9th 10th 11th June 2003

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Tuckey:

1. The appellant, Welex, was the named consignee of a shipment of steel plates which it claims suffered salt water damage whilst being carried on the respondent's vessel, Epsilon Rosa, on the terms of a bill of lading in the Congenbill form. Welex appeal David Steel J's decision that English law and London arbitration terms in the charter of the vessel were incorporated into the bill of lading [2002] EWHC 762 (Comm.); [2002] 2 Lloyd's Law Rep. 81 and the anti-suit injunction which he granted to restrain Welex from proceeding with its claim against Rosa in Poland [2002] EWHC 2035 (Comm); [2002] 2 Lloyd's Law Rep. 701.

The facts

2. The steel plates were made in Ukraine by Ilyich Iron & Steel Works, the shippers named in the bill of lading. The plates were sold to Welex, a Swiss company, through two German companies, Korympic and Liberty. Welex's contract with Liberty made in early 2001 was for delivery c.f.r. free out Szczecin, Poland. The contract permitted the sellers to tender bills of lading incorporating the terms of any charterparty without any obligation to provide a copy of such charter.

3. Red Sea Heavy Industries Corp./Scaneurosteel are substantial shippers of steel cargoes. In March 2001 they approached Mr Suzer, a chartering broker in Haifa, to obtain a quote for the carriage of the steel plates from Mariupol, Ukraine to Szczecin.

4. After a good deal of negotiation with Rosa's broker, Mr Nakis Kassos of Epsilon Ship Management, Limassol, Mr Suzer e-mailed and faxed him on 19th March with a "FULL RECAP" which "IS AS FOLL FOR YR URGENT RE- APPROVAL". The recap set out the terms of the voyage charter which had been negotiated between the brokers. The vessel was identified as having been "fully described". A full description had been given in earlier exchanges and the vessel at least had been approved by Welex as the words "SUB STEM/SHIPPERS/RECEIVERS APPROVALS LIFTED" showed. The material terms of the recap were:

   - ARB IN LONDON. ENGLISH LAW TO APPLY

   - OWISE AS PERCHRTS STANDARD C/P DETAILS AMENDED AS PER MAIN RECAP WHICH RECAP TERMS SUPERSEDE ANY CONTRADICTORY TERMS IN THE C/P WITH THE FOLL ALTERATIONS: ….

   47. As written by hand "London".

   Shortly before the recap Mr Suzer had sent the charterers' standard charterparty showing the alterations which had been agreed. Clause 47 of the standard charter said:

   > Arbitration if any to be settled in Hamburg in accordance with the rules of the GMAA.

but the word "Hamburg" had been crossed out and "London" added in manuscript. Attached to the standard terms was an expanded form of clause 47 which the charterers used when providing for London arbitration. This dealt with the appointment of arbitrators and provided for the arbitration to be conducted under LMAA rules and the contract to be governed by English law.

5. Within minutes of receipt of the recap and the terms Mr Kassos replied:

> This is to confirm that we hv found everything in order and we consider the vsl fully fixed.

6. It is common ground that in these exchanges Rosa and Red Sea concluded a binding voyage charter of the vessel. What happened next was the subject of considerable confusion and controversy. But the judge accepted Mr Suzer's evidence that by the 21st March he had drawn up a formal charterparty which he sent to Mr Kassos for signature by Rosa. He received it back signed almost immediately and by the 3rd April sent it for signature by charterers. He did not receive it back from them and forgot to chase it. In October he was sent a copy of the executed document signed by Mr Uzon of Scaneurosteel who said that he had signed the original some time in April. The document was undated, but with minor variations, which I think are of no significance to the present dispute, it reflects the terms agreed in the telex/e-mail exchanges to which I have referred.

7. The vessel arrived at Mariupol and started loading on 7th April. The bill of lading was issued on behalf of the master on 9th April. It is in the Congenbill form 1994 edition and states that it is to be used with charterparties. 5394 mts of plates were shipped and the bill is clausued to show that they were wet before shipment and showing signs of rust and other damage. Typed on the face of the bill are the words "FREIGHT PAYABLE AS PER CHARTER PARTY", but the printed box below which says:

> Freight payable as per
>
> CHARTERPARTY dated

was left blank. Clause 1 of the printed conditions of carriage on the back of the bill says:

> All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

Other conditions followed, including one applying the Hague or Hague-Visby Rules.

8. On 1st May the vessel arrived at the discharge port of Szczecin. The cargo was found to be damaged. Various surveyors inspected it and the vessel. It is Welex's case that the damage was caused during the voyage by sea water entering the holds through defective hatches. The cargo had been on-sold and Welex's claim is now limited to the $550,000 price reduction which it had to give to its buyer because of the poor condition of the steel plates.

9. Although by mid May Welex had made a claim against Rosa they did not at that time or in the following months ask to see the charterparty to which the bill of lading which they were holding referred.

10. On the 31st May Rosa sold the vessel to Alexia Navigation Limited. Both are Maltese companies with the same address and both are managed by Epsilon from Cyprus.

11. The vessel was arrested in Portugal in July 2001 as security for the cargo claim. The arrest proceedings were taken by Welex against both Rosa and Alexia because under Portuguese law a cargo claim creates a maritime lien over the ship. The final arrest order was made on 19th July and the vessel has remained in Setubal ever since. We have not seen any order made by the court on 19th July but Welex say that as a condition of maintaining the arrest they were ordered to start proceedings on the merits in respect of their claim within 60 days of that date. Such a condition is required by Articles 7 (2) or 7 (3) of the Brussels Arrest Convention 1952. It is common ground however that the court did not say whether the proceedings should be in court or by way of arbitration or in which jurisdiction they should be taken.

12. Rosa has taken no part in the Portuguese proceedings. On 31st July Alexia applied to lift the arrest. Their first ground for doing so was that the Portuguese court had no jurisdiction because Welex's contract of carriage incorporated the terms of the charterparty which provided for London arbitration and was subject to English law. In support of this contention Alexia's Portuguese lawyers only produced the charterers' standard conditions amended in manuscript and the expanded form of clause 47 attached to which I have referred. On 18th September the Portuguese court rejected Alexia's application. Dealing with its first ground the court said it was competent to order an arrest although it had no jurisdiction to decide the main dispute on the merits. It also pointed out that Alexia was not a party to the contract of carriage.

13. In the meantime, on 4th September, Welex started proceedings in the District court of Szczecin against both Rosa and Alexia. There is also a maritime lien under Polish law. Those proceedings had to be served by the Polish court who did not accomplish this until 2nd June 2003 so they have not progressed far and are currently the subject of the anti-suit injunction which was made on October 14th 2002.

14. It is apparent from what happened in the Portuguese proceedings that Welex must have been aware, at least by 31st July 2001, that it was being contended that their contract with Rosa was subject to English law and London arbitration. And yet it is common ground that before starting the proceedings in Poland Welex made no enquiry of Rosa or anyone else to try and discover whether this contention was correct. I shall return to consider this further together with Welex's explanation for what they did.

15. Rosa soon learned of the Polish proceedings and on 19th September its English solicitors, Brookes & Co., wrote to Welex complaining that the proceedings were in breach of clause 47 of the charterparty and saying that they had started a London arbitration by appointing owners' arbitrator. A second arbitrator has since been appointed by the LMAA in default of appointment by Welex.

16. Following their letter of 19th September Brookes & Co. sent copies of the recap telex and the standard terms to Welex at their request. Welex's German lawyers then came

on the scene saying that the documents which Welex had been sent were not a charterparty and that their clients "doubt and deny" its existence. In the following weeks Brookes & Co., no doubt on instructions, made a number of conflicting statements about the existence of the charterparty which culminated in the production on 13th November of what was described as an executed copy of the charterparty. Mr Suzer subsequently confirmed that this document was a copy of the charterparty executed by both parties and it was his evidence which led the judge to find that Rosa had adduced convincing secondary evidence that the charterparty had been duly executed in this form in April 2001. But the production of this document had unfortunate consequences, which it is not necessary for me to relate in view of the judge's finding which is not the subject of appeal. They are however set out in paras. 19 and 33 of the judge's judgment.

17. On 2nd July 2002 an application by Alexia to the Portuguese court to release the vessel in exchange for a bank guarantee of its liability to Welex was rejected on the ground that the guarantee did not cover Rosa's liability as well. Following this decision Alexia extended their offer of a guarantee to cover a judgment against Rosa in Poland but refused to offer any guarantee in respect of an award against Rosa in the London arbitration.

18. Since the grant of the anti-suit injunction Rosa has admitted liability in the arbitration for damage caused to the steel plates by sea water. The issue between the parties is therefore whether and if so to what extent they had sustained pre-shipment damage. That is an issue, as everyone accepts, which an English maritime arbitration is ideally equipped to resolve with minimum delay at little cost.

19. Welex however fears that if it arbitrates the dispute in London it will lose the security of the vessel in Portugal because the arbitration was started more than 60 days after the 19th July. Welex's English solicitor says:

> Welex are concerned that if the claims against Rosa have to be arbitrated in London, the Portuguese court may recognise only the Polish proceedings as valid proceedings on the merits but not the English arbitration proceedings. I say "may" because my clients will certainly argue to the contrary; but it is clear that Brookes' clients will dispute this.

20. In these circumstances it is unfortunate that we do not have the order made by the Portuguese court on 19th July because there is some doubt as to when the 60 day period started to run. If the 60 days ran from the 19th July it expired on the 17th September, 2 days before the arbitration started. If the order took effect at some later date (and it was not served on the master until 31st July) the arbitration was in time.

Incorporation

21. The judge decided this issue and the appeal has been argued before us on the basis that English law is applicable. The judge first considered whether the recap telex and standard form to which it refers constituted the "Charter Party" referred to in the bill of lading on the assumption that no final charterparty had been drawn up by the time the bill was issued. In concluding that it did he rejected Welex's submissions saying:

> (i) There is in my judgment no significance in the use of capital letters, any more than there is anything to be derived by dictionary references to charter-parties in the form of deeds.
>
> (ii) While a contract for chartering a ship is normally embodied, in due course, in a printed form, the parties' agreement can remain in the written fax or telex exchanges: a signed charter-party is unnecessary: *Lidgett v Williams* (1845) 4 Hare 456.
>
> (iii) The terms can readily be identified from the contents of the recap telex and the standard form to which it refers. Indeed, freight was payable (and paid) according to the terms of the very same charter-party.
>
> (iv) There is no significance in the fact that the formal written agreement, whether executed or not, is in different terms, subject of course to the appropriate authority of those who have executed it: *Rossiter v Miller* [1873] 3 App. Cas. 1124.
>
> (v) The absence of an identifying date on the bill of lading does not negative incorporation: *The San Nicholas* [1976] 1 Lloyd's Rep. 8, *The SLS Everest* [1981] 2 Lloyd's Rep. 389.

22. Welex had relied on the decision of Judge Diamond Q.C. in *The Heidberg* [1994] 2 Lloyd's Rep. 287, but the judge thought that this case was only authority for the proposition that the transferee of a bill of lading should not be affected by oral terms. He concluded by saying that the commercial realities, which included the fact that Welex was aware of and had approved the fixture, were wholly inconsistent with its submissions.

23. The judge then considered the issue of fact as to whether a formal charterparty had been executed "prior to the completion of discharge, referable to a date prior to the bill of lading" and on his findings that it had been, he concluded that the arbitration clause in that document (alternatively in the recap telex) was incorporated into the bill of lading.

24. Mr Dunning Q.C. for Welex submits that both of the judge's conclusions were wrong. The court's task was to construe the words "the Charter Party dated as overleaf" in the bill. In doing so it should bear in mind that the Congenbill form is widely used and may serve a number of purposes and be held by parties in different capacities. Consignees, indorsees and pledgees are unlikely to be aware of the terms of the charter party. If the terms of that contract are to be incorporated there is a need for certainty so that all such parties know where they stand. This is particularly the case with an arbitration clause because such a clause is not germane to the receipt, delivery or carriage of the cargo and operates to exclude access to the courts. (*T.W. Thomas & Co. v Portsea Steamship* [1912] AC 1 and *The Federal Bulker* [1989] 1 Lloyd's Rep. 103). The question to be asked was: what would an ordinary businessman having both documents before him think with regard to the applicability of the arbitration clause in the charterparty to bill of lading disputes? If he was left in any doubt on the matter the arbitration clause would not be incorporated. (See *The Annefield* [1971] P

168, 177). The words in question here cannot refer to a recap telex which is not a charterparty or at least there must be some doubt about the matter. They refer to a single document of a formal kind. Under section 2 (1)(b) of the Carriage of Goods by Sea Act 1992 a named consignee becomes a party to the contract in the bill of lading when it is issued. That is the time at which the court must look to see whether the charterparty has been incorporated. On 9th April when the bill of lading in this case was issued there was no executed charterparty because it is common ground that Mr Uzon had not signed the charterparty on behalf of Charterers by that time.

25. I accept Mr Dunning's submission about the need for certainty but in this case it is important to bear in mind a number of other factors. Both the bill of lading and the charterparty relate to the same voyage by the same carrier. It is obvious that the shipowner will want to ensure, so far as possible, that his rights and obligations as carrier as against the original and any later holder of the bill of lading are the same as his rights and obligations as against the charterer. The Congenbill form which on its face says it is "to be used with charterparties" is designed to achieve this objective. It should be apparent to any holder of the bill that all the terms of the contract are not contained in that document and that the other terms are to be found in the related charterparty. I suspect that these factors explain why the courts more readily accept that terms are incorporated into bills of lading than in some other contractual contexts.

26. The particular concern about the incorporation of arbitration clauses is met by the Congenbill form which expressly says that it incorporates all terms of the charter party "including the law and arbitration clause". Parties involved in transactions such as these will be aware that contracts of this kind do commonly contain dispute resolution machinery and often provide for arbitration in some neutral forum.

27. With these considerations in mind I do not think that there is any reason to give a narrow meaning to the words "the Charter Party" in the bill of lading. The use of capitals is insignificant. For no good reason the words "law", "arbitration" and "clause" are dignified in the same way. The clear intention is to refer to the contract under which the vessel which is to carry the goods the subject of the bill has been chartered. Whilst the omission of the date on the face of the bill is not fatal (see the two Court of Appeal decisions to which the judge referred), no one could infer from this that the parties to this bill had not intended to incorporate the terms of the charter because immediately above the box with the blank in it the bill contains the typed term that "freight is to be payable as per the charter party". The context (e.g. the words "date" and "clause") strongly suggests that the reference is to a document or to documents; in other words to a charter which has been reduced to writing.

28. In *The Heidberg* brokers had agreed the terms of a charter orally. The recap telex erroneously referred to standard terms which provided for arbitration in Paris, whereas the standard terms orally agreed provided for London arbitration. The bill of lading which was in much the same form as the Congenbill incorporated the terms of "the charter party dated (blank)". Judge Diamond held that these words did not incorporate a charter agreed orally. They referred to a charterparty which had been reduced to writing. His reasons for this conclusion include the need for terms incorporated by reference to be readily ascertainable. Extensive investigation as to the undocumented contractual arrangements of third parties would introduce considerable uncertainty. I agree, but do not accept Mr Dunning's submission that reference to a recap telex would produce similar uncertainty. Take the instant case: a quick look at the telex and the accompanying terms would have left the reader in no

doubt that the charter required London arbitration. The same applies to the other important terms of the contract. Although there was an inconsistency between the two forms of clause 47 the parties clearly expressed their choice of London arbitration from which it would follow that the expanded form with its reference to the LMAA rules was to apply. Arbitration in London subject to GMAA rules would make no sense.

29. But Mr Dunning submits that Judge Diamond supports his submissions. He relies on the passage at p. 311 where the judge said:

> I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of a charterparty which, at the date the bill of lading is issued, has not been reduced to writing. For the reasons given earlier an oral contract evidenced only by a recap telex, does not seem to me to qualify for this purpose. I should add moreover that if I am wrong on this, I would still conclude that the bill of lading does not on its true construction incorporate an oral agreement for arbitration in London which at the date of the bill of lading was not evidenced by any document at all.

Like David Steel J., however, I do not think Judge Diamond's earlier reasons support the view that a recap telex does not qualify. They clearly support the view that an oral agreement which has not been reduced to writing does not qualify, but a recap telex does reduce the contract to writing. Earlier in his judgment (at p. 312) Judge Diamond had been prepared to accept that such a document "might perhaps be treated as capable of being incorporated into a bill of lading". I think it can, although I do not say this will always be the case. Mr Dunning suggested that if we uphold the judge's decision, holders of bills of lading would find themselves having to trawl through endless telex exchanges and other documents to which they refer in order to ascertain the terms of the incorporated contract. I do not agree. One cannot generalise in these cases. If the contract is readily ascertainable, as it is in this case, there is no uncertainty and its terms will be incorporated. If it is not, there will be no incorporation.

30. So for these reasons I conclude that the judge reached the right conclusion about the recap telex. But as the judge also decided that there was in fact a formal charterparty, I turn to consider Mr Dunning's criticism of this part of his decision.

31. It is normal practice for the agreed terms of a fixture to be drawn up into a formal document which is signed by the parties to it. This document is not usually intended to vary or supplement the essential terms of the contract which have already been agreed, but merely to set the contract out fully in a document or documents which the parties will then execute. But sometimes this is not done at all and often it will not be done for some time. To meet the objection that if the charterparty had to be executed by the time the bill of lading was issued the bill of lading might not function satisfactorily, Judge Diamond said in *The Heidberg* (p. 310) that:

> If a formal charterparty has been executed in sufficient time to be sent or shown to the bill of lading holder when he first demands to be shown a copy, (and if the date on the charterparty is earlier than that on the bill of lading), I do not

> see why the court should go behind the date which appears on the charterparty or should investigate whether the charterparty was executed before or after the bill was issued.

This seems to me to be a commendable pragmatic approach to the problem. Whenever the formal document is executed, if it is referable to a contract which is made before the date of issue of the bill of lading the tests of ascertainability and certainty are met. In this case, although the document is undated, it is clearly referable to a fixture made in March 2001. Welex did not ask to see it until September 2001. The judge proceeded on the basis that the relevant time was the completion of discharge. But by either of these times the formal document had on the judge's findings been executed.

32. It follows that I do not think there is anything in Mr Dunning's point that the formal document was not executed by both parties to the contract until after the date of issue of the bill of lading. He takes a further point, however, based on the fact that when Welex did ask to see the charter party Rosa failed to produce anything for some time and have never in fact produced the original executed document or a true copy of it. This is regrettable but I do not think it can affect the legal rights of the parties. On the judge's findings there was a document which could have been produced in April 2001. That document was sufficiently identified by and incorporated into the bill of lading. The fact that the original or an original copy could not subsequently be produced cannot alter the position. If, for example, the original charterparty had been lost the fact that the shipowner could only produce secondary evidence of its existence could not affect the rights and obligations created by the bill of lading.

33. It follows that I think the judge's other reason for finding that the arbitration clause was incorporated into the bill of lading was also correct.

The Anti suit injunction

Jurisdiction

34. David Steel J. refused permission to appeal against either of his decisions. This court (The Master of the Rolls and Rix L.J.) granted permission. Immediately before the hearing Ms Karen Troy-Davies, for Rosa, put in supplementary submissions in which she said that this court had no jurisdiction to hear the appeal against the injunction.

35. Rosa's application for an anti-suit injunction was first made to the arbitrators under section 48 (5) of the Arbitration Act 1996, which gave the tribunal the same power as the court "to order a party to do or refrain from doing anything".

36. Section 44 of the Act gives the court power to grant an interim injunction "for the purposes of and in relation to arbitral proceedings" but as the anti suit injunction was a final injunction it is common ground that it was not made under this section.

37. Welex's application for a declaration that there was no valid arbitration agreement was made under section 72 of the Act because they had taken no part in the arbitration. This section does not restrict the right of appeal. Faced with this application Rosa sensibly agreed that their application for an injunction should be heard by the court at the same time as Welex's section 72 application and this is what happened with the consent of the arbitrators. No-one gave any thought at the time as to the basis of the court's jurisdiction to grant the injunction, but Ms. Troy-Davies

submits that it must have derived either from section 32 or section 45 of the Act although no application was in fact made to the court under either of these sections or considered by the court as having been so made.

38. Section 32 gives the court power to determine any question as to the substantive jurisdiction of the tribunal provided certain conditions are met. Section 45 gives the court power to determine any question of law arising in the course of the arbitration subject to similar conditions. Both sections restrict the right of appeal to cases where the court of first instance has given leave.

39. But neither section 32 or section 45 confer any express jurisdiction on the court to grant final injunctions in aid of decisions made under these sections. Ms Troy-Davies submits that such jurisdiction is to be implied. I do not accept this. The Act spells out the court's jurisdiction when it is performing the various functions assigned to it. The fact that no express power to grant injunctions is given to the court when it is exercising its powers under section 32 or section 45 is determinative.

40. I accept Mr Dunning's submission that the High Court's jurisdiction to grant permanent anti-suit injunctions derives from its general power under section 37 (1) of the Supreme Court Act 1981 to grant a final injunction in "in all cases in which it appears to the Court to be just and convenient to do so". There is no restriction on the right to appeal from such an order. This therefore is the short answer to Ms Troy-Davies' late point.

The Merits

41. The judge referred to *The Angelic Grace* [1995] 1 Lloyd's Rep. 87 and *Donohue v Armco* [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425 to the effect that Welex had to show strong reasons for being allowed to proceed against Rosa in a non-contractual forum.

42. Of Welex's concern about losing their security in Portugal if they were forced to arbitrate in England, he said that the decision of the Portuguese court in July 2002 not to release the vessel without a guarantee of Rosa's liability should allay Welex's fears.

43. The judge recognised that there was some doubt as to whether it was appropriate to grant an anti suit injunction where, as here, the other forum (Poland) was a party to the Lugano Convention and that the risk of that proceedings would continue there against Alexia was potentially a highly significantly factor. He did not, however, think that this was a factor of great weight in the present case because:

> In the event that Welex are required to arbitrate their claim against Rosa, it would seem improbable that they would concurrently continue to pursue their claim against Alexia in Poland. The claim filed in Poland asserts that Rosa is liable by virtue of Art. 160 of the Polish Maritime Code. As regards Alexia, the pleaded case is that the transfer of ownership does not preclude the recovery from the proceeds of sale of the vessel.
>
> Thus Welex can only enforce a claim against the vessel (or its proceeds) if it first establishes liability on the part of Rosa.

> But, if Welex anticipated succeeding on liability before the arbitrators, it is difficult to see on what basis it would meanwhile wish to continue or resurrect the Polish proceedings against Alexia. In any event Alexia have offered to arbitrate in London themselves.

44. As to questions of convenience the judge said:

> The primary issue of fact relates to the condition of the cargo on loading in the Ukraine as compared with its condition on discharge in Poland. The vessel was managed in Cyprus and manned by a Philipino crew. The surveyors were variously Ukrainian, Polish and Belgian. On the other hand, all the documents are in England or have been translated into English for use in the arbitration proceedings. In contrast, the Polish proceedings have yet even to be served. Furthermore, it would appear that the Polish Courts would not apply English law despite the choice by the parties (albeit it is fair to say that there is no evidence that the substantive law on liability is any different). In these circumstances, whilst Poland might on balance be more convenient than England, it is not a matter of significant weight.

45. Finally the judge added by reference to the observations of Colman J. in *Toepfer v Cargill* [1997] 2 Lloyd's Rep. 90, 110 that matters such as forum non conveniens or the risk of inconsistent decisions were of little weight in a case to which the New York Convention applied (as it does in this case) since the Convention left no room for discretionary flexibility in the enforcement of an arbitration clause.

46. Mr Dunning submits that the court should first start by assessing what weight to give to the arbitration clause in the contract. Where, as here, the term was not negotiated by or known to Welex, but imposed upon them by statute, little weight should be given to it. Its effect was outweighed principally by the fact that if it was enforced Welex's security would be put at risk. In *The Angelic Grace* and other cases in which anti-suit injunctions have been granted there was no question of the party enjoined losing security as a result. The judge was wrong to say that the decision of the Portuguese court would allay Welex's fears: it did not address Welex's concern that the security would not be available to satisfy an English arbitration award against Rosa at all. Nor was the judge right to say that Welex would not proceed with the Polish proceedings against Alexia. Poland, the country in which the cargo was to be delivered, was the obvious natural forum for deciding the dispute, which had no connection whatsoever with England. Finally the English court should be inhibited about granting anti-suit injunctions where the New York and Lugano Conventions applied. In this case it should be left to the Polish courts to decide whether they had jurisdiction. For all those reasons the judge should not have granted the injunction in this case.

47. The applicable law was clearly summarised by Lord Bingham in *Donohue v Armco* where at para. 24 he said:

> If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim

> falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria,* [1969] 1 Lloyd's Rep. 237 at p. 242 Mr Justice Brandon helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion and his judgment has been repeatedly cited and applied. Mr Justice Brandon did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material.

48. I need not cite the well-known passage from *The Eleftheria* to which Lord Bingham refers but the matters listed included prejudice as a result of being deprived of security for the claim and other factors of convenience. Nevertheless the starting point is, as the judge said, that the party suing in the non-contractual forum must show strong reasons for doing so or he faces the prospect of an injunction being granted against him. I accept that the court should take into account how serious the breach is. In other words a defendant who cynically flouts a jurisdiction clause which he has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him and has acted in good faith. But I do not think this leads to a sliding scale of enforcement. The parties to a contract, however it is made, should abide by its terms. If they have agreed to resolve their disputes in a particular way they should be kept to their bargain unless there are strong reasons for not doing so.

49. I accept that loss of security could amount to a strong reason for not granting an injunction. But should it do so in this case? I have already set out the facts which show, I think, that it is not at all clear whether the security in Portugal would be available to meet an arbitration award against Rosa in England. The most that can be said is that there is a risk that it will not be available. I accept that the judge over-estimated the comfort which Welex could derive from the Portuguese court's decision in July 2002, although at least it showed that the court expected the security to be available to meet the claims against both Alexia and Rosa. But what leads me to attach less weight to the risk that Welex will lose their security than I would otherwise

have done is that they have brought this on themselves. The Portuguese court did not prescribe the proceedings which had to be brought. If Welex had started arbitration in London this whole dispute would have been resolved ages ago. Instead it made no enquiries about the terms of the charterparty until after it had started proceedings in Poland and, (arguably), the 60 days had elapsed. This, despite the fact that Alexia were relying on the arbitration clause in July in the Portuguese proceedings. Welex say that it was entitled to assume that Alexia had put forward Rosa's best case for incorporation of the charterparty terms and mere production of the standard terms proved nothing. That may be, but a simple request to Rosa would I suspect have immediately produced the recap telex, as it did in September, which, together with the terms, ought to have made it clear that Welex had to arbitrate in London. For these reasons I do not think that the risk that Welex will lose its security is determinative.

50. The proceedings against Alexia in Poland cannot be restrained. Alexia's liability must, I should have thought, be contingent upon Rosa's liability. All the judge was saying is that if Welex has to arbitrate its claim against Rosa in London it would not "concurrently" pursue its claim against Alexia in Poland. With an arbitration award against Rosa in London, which the Polish courts would be required to recognise under the New York Convention, Welex could proceed to establish their claim against Alexia if necessary. The risk of conflicting decisions in different jurisdictions would therefore be avoided. On the other hand, if the injunction were discharged, the London arbitration would doubtless proceed. The Polish court would have to decide whether it had jurisdiction over Rosa in which case there is a risk that its decision would conflict with that of the English courts on the incorporation issue. If the Polish court decided it had jurisdiction, there is a risk that its decision on the merits would conflict with the award in the arbitration. For these reasons I do not think that continuing proceedings in Poland against Alexia provide any reason for not enjoining Welex.

51. The judge summarised the convenience factors which I have quoted in para 44. I agree with his assessment of these factors. English law and London arbitration clauses are often chosen to provide a neutral forum for dispute resolution. By making this choice the parties accept that their dispute will have nothing to do with England.

52. Finally I accept that there is considerable debate as to whether the English courts should grant anti-suit injunctions where the Lugano or New York Conventions apply. Although the injunction acts in personam and is not directed at the foreign court this is not how it is always perceived. For the moment, however, the law is as stated in *Donohue v Armco*. A related;p0. point is before the European Court in *Turner v Grovit* [2001] UKHL 65, a case to which the Brussels Convention applies, but the reference is yet to be determined.

53. Applying the law as it now is to the facts of this case I think the judge was right to grant an anti-suit injunction in this case. I accept that he may not properly have evaluated the risk that Welex might lose their security and so to this extent his exercise of discretion was flawed. If so we have to exercise the discretion afresh. I would nevertheless hold that the injunction should be granted for the reasons I have given.

Conclusion

54. I would dismiss both of Welex's appeals.

Lord Justice May: I agree.

Lord Justice Brooke: I also agree

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