Neutral Citation Number: [2002] EWHC 762 (Comm)

Case No: 2001 / 1189

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT
Neutral Citation Number: [2002] EWHC 762 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

25th April 2002

B e f o r e :

THE HONOURABLE MR JUSTICE DAVID STEEL

Between:

WELEX AG — **Claimant**

-and-

ROSA MARITIME LIMITED — **Defendant**

GRAHAM DUNNING QC and RICKY DIWAN (instructed by STEPHENSON HARWOOD) for the CLAIMANT
KAREN TROY-DAVIES (instructed by BROOKES & CO) for the DEFENDANT
Hearing dates: 31st January 2002, 28th February and 1st March 2002

HTML VERSION OF HANDED DOWN JUDGMENT

Mr Justice David Steel:

Introduction

1. The court is faced with cross applications. The claimant seeks a declaration that no arbitration agreement was incorporated into a contract of carriage contained in or evidenced by a bill of lading between **Welex** AG ("**Welex**") as consignees/receivers and Rosa Maritime Ltd ("Rosa") as owners of *Epsilon Rosa,* together with an application for consequential orders, first that the London arbitration proceedings commenced by Rosa are of no effect and secondly restraining Rosa from proceeding with the arbitration. The defendant applies for an anti-suit injunction restraining **Welex** from continuing the proceedings that it has commenced against Rosa in Szczecin, Poland or otherwise prosecuting proceedings against Rosa other than by way of the arbitration that has been commenced.

The background

2. The dispute relates to a shipment of 5,394 metric tonnes of steel plates from Mariupol, Ukraine, to Szczecin, Poland on board *Epsilon Rosa*. The Bill of Lading, dated 9th April 2001, was on the Congenbill form expressly "to be used with Charterparties". The shippers were Ilyich Iron and Steel Works. The consignee was named as "Korympic Steel International GmbH on behalf of **Welex** AG".

3. The Bill of Lading was claused by various ship's remarks that the cargo had been stored in the open, was wet before shipment and exhibited some rust. There was a typed clause to the effect that "freight payable as per Charter Party". There was also a box, which had not been filled in, that read:- "Freight payable as per CHARTERPARTY dated…". On the reverse, clause 1 read: - *"All the terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*" The focus of the dispute between the parties was whether there was, at any material time, a "Charter Party" and whether the arbitration clause contained within it was incorporated into the Bill of Lading by virtue of Clause 1.

4. The purchase contract was evidenced by an exchange of Purchase Orders between **Welex** and Liberty Steel and Services GmbH ("Liberty") dated 28th January and 8th February 2001 respectively. The delivery terms were cfr, free out, Szczecin, INCO Terms 2000. The general purchase terms of **Welex** were applicable. They included the provision:- "*Unless otherwise agreed, bills of lading tendered under CIF and CFR contracts may be issued incorporating terms of any Charter Party.*" Notably, whilst INCO terms 1990 stipulated that the seller must provide a copy of the Charter Party, this requirement had been deleted in INCO terms 2000.

5. The Master signed the Bills of Lading on 9th April 2001. The same day, the charterers intimated a small claim for short shipment. The owners' response on the 12th April was a demand for payment of the freight in full, pending particularisation of any claim. The charterers made a proposal on the 13th April for payment of freight, less a shortage of 100 metric tonnes and other expenses. This freight claim was in due course settled on about the 20th April.

6. On May 1st, the vessel arrived at the discharge port of Szczecin. During discharge, the claimant's surveyors found that the cargo was damaged. It was their view that the cargo had been wetted by seawater, probably through leaking hatch covers.

7. On 31st May 2001, the vessel was sold by Rosa to Alexia Navigation Ltd ("Alexia"). The Maltese register was duly amended to that effect in June 2001. On 16th July 2001, the claimant instituted arrest proceedings in the maritime court in Lisbon. These proceedings were instituted against both Rosa and Alexia. Despite the sale, *Epsilon Rosa* was arrested on the 19th July following a short oral hearing. On 4th September, the claimant filed a claim with the District Court of Szczecin against both Rosa and Alexia claiming compensation in the sum of $868,654 USD. It was the claimant's contention that the claim carried a lien irrespective of the change of ownership, pursuant to the Polish maritime code.

8. On 18th September, the new owners applied to lift the arrest in Lisbon. This application was dismissed, although security was ordered in the reduced sum of $596,463.00. Nonetheless, Alexia's club refused to pay security on the grounds that it was not liable in respect of the claim. Rosa's club also refused to furnish security on the grounds that its member no longer owned the vessel.

9. This unfortunate impasse has led to the vessel remaining under arrest to date since there is no provision for sale *pendente lite* under Portuguese law. This situation was rendered all the more unattractive by the fact that the vessel's value is no more than $1,000,000 even before the deduction of the costs of arrest and any other prior claims.

10. On 19th September, the day after the application to lift the arrest failed, Rosa commenced arbitration proceedings in London. This arbitration was purportedly invoked pursuant to a fixture evidenced by recap telex from Caspi Cargo Lines ("Caspi") acting on behalf of charterers dated 19th March 2001. This re-cap telex read as follows:

> "FULL RECAP IS AS FOLL FOR YR URGENT REAPPROVAL:
>
> MV EPSILON ROSA , AS FULLY DECRIBED
>
> FOR:
>
> - ACCT MESSRS. RED SEA HEAVY INDUSTRIES L.A
>
> - SUB STEM / SHIPPERS / RECEIVERS APPROVALS LIFTED
> - MIN 5,474.033 / MAX 5.500 MTS CHOPT STEEL PLATES OF MAX 12 MTRS, STW – DWT
> - LDING: 1SB MARIUPOL COMMERCIAL PORT
> - DISCH: ISB STETTIN (SZCZECIN – NORT POLAND)
> - FRT USD 23.00 PER MT FIOS L/S/D PAYABLE IN USD
> - FRT DEEMED EARNED ON COMPL OF LDING DISC NOT RETURNABLE VSL N/O CGO LOST OR NOT LOST
> - FRT TO BE PAYABLE 100 PCT LESS BROKERAGE COMM W/1 3 B. DAYS AFTER S/R BS/L MARKED "FRT PAYABLE AS PER C/P" IN TO THE OWS NOMINATED BANK ACCOUNT IN US DOLL CURRENCY IAC BBB
> - BSL MARKED "CLEAN ON BOARD"
> - CHRTRS TO ISSUE LOI WITH OWNS PANDI WORDING FOR THE OTHER REMARKS WHICH WILL BE INSERTED IN THE MATE'S RECEIPT
> - FOLLOWING REMARKS ALLOWABLE IN THE BS/L:
> - "ATHMOSPHERICALLY RUSTY"
> - "LOADED EX OPEN STORAGE"
> - "WET BEFORE SHIPMENT"
> - ARB IN LONDON, ENGLISH LAW TO APPLY
> - OWISE AS PERCHRTS STANDART C/P DETAILS AMENDED AS PER MAIN RECAP WHICH RECAP TERMS TO SUPERSEDE ANY CONTRADICTORY TERMS IN THE C/P WITH THE FOLL ALTERATIONS:
>
> + C1. 47: As written by hand "London""

11. The accompanying standard form had indeed been amended in manuscript in that clause 47 read:- "47. Arbitration, if any, to be settled in London in accordance with the Rules of the LMAA".

12. In reply, Epsilon had stated that the recap telex was "in order" and that, accordingly, the vessel was "fully fixed". Notably, Liberty had then sent a fax to **Welex** (Deutschland)

GmbH on the 16th March confirming the fixture of *Epsilon Rosa* "subject your stem". **Welex** (Deutschland) responded on the 20th March giving bill of lading instructions in a fax copied to **Welex**.

13. Despite all this, the reaction of the claimant (through its German lawyers in a letter dated 20th September 2001) to the notification by Rosa of the institution of arbitration proceedings, and the concurrent request to terminate the proceedings in Poland, was to deny the existence of any Charter Party:-

> "*Most certainly the documents attached to your first message to our clients dated 19th September 2001 does not prove an agreement on that Charter Party and/or arbitration clause.*"

14. The letter went on to say:-

> "*The Bill of Lading issued on the 9th April 2001 was apparently signed by the Master. The Bill does not identify any Charter Party, let alone any particular one dated 19th March 2001 between owners and Red Sea Heavy Industries LA. As no Charter Party was indentified, the general words of incorporation in the printed clause 1 on the back of the B/L are not capable of incorporating terms and conditions of any Charter Party*".

15. The claimant issued its application notice seeking a declaration that there was no arbitration clause incorporated in the Bill of Lading on the 17th October 2001. Its primary case at that stage was that the issue had been decided in their favour by the Portuguese Court in their judgment dismissing Alexia's application to lift the arrest. This submission is no longer pursued.

16. The actual focus of the claimant's case has become and remains that no formal "Charter Party" was executed at any material time by the parties. By way of further particularisation, the claimant says:

> a) No such document has ever been produced;
>
> b) No satisfactory evidence as to its existence has ever been tendered.

17. Alternatively, it was contended that the resolution of this factual issue in the defendant's favour was not determinative of the issue of incorporation. The claimant submitted that the law applicable to the incorporation of the arbitration clause was Swiss law or, in the alternative, Ukrainian law, pursuant to which the arbitration clause of even an executed Charter Party would not be incorporated.

18. The defendant's position was that a Charter Party had been duly executed, the applicable law was English law and that, accordingly, the arbitration clause within it was duly incorporated. Alternatively, in the event a Charter Party had not been executed, nonetheless the recap fax and the associated documentation was sufficient to constitute the Charter Party for the purpose of incorporation.

The procedural history

19. I have taken this analysis of the issues very shortly because of the way in which matters have developed procedurally:

> a) In a statement by the defendant's solicitor in support of the anti-suit injunction dated 10th October 2001, it was stated that a formal version of the charterparty had probably been drawn up but that the person most likely to

be able to locate it, namely Captain Ioannou of Epsilon, was at that stage away from the office.

b) Following a period of investigation, in a further statement dated the 13th November, the defendant's solicitor exhibited what was described as an executed copy of the charterparty, albeit not derived from Epsilon but from Caspi, the charterer's brokers.

c) This provoked the claimant's solicitors to request further disclosure with regard to the date of the document, the identity of those who had executed it and the explanation for the difference between the terms of the executed Charter and the recap telex.

d) In response, the defendant furnished a witness statement of Mr Altug Suzer of Caspi. He described how he drew up the Charter Party, obtained the signature of Mr Nakis Kassos of Epsilon and forwarded it to the Charterers for signature prior to 3rd April 2001. When asked by the claimant to produce a copy in September, he realised that he had not received it back. On making enquiries with the charterers, he received a copy of the executed document which had been produced, signed by Mr Ali Uzon of Scanurosteel on 28th October. Mr Uzon was reported to have said that he considered he had signed the charterparty some time in the previous April.

e) On 20th December, agreement was reached between the parties for inspection by the claimant of the faxed copy of the charterparty referred to in paragraph (b) above. Such examination revealed that it was clearly made up of three different sets of documents, something which has since been confirmed by forensic analysis. An explanation was sought by the claimant from the defendant.

f) In pressing for an explanation, the claimant threatened to resurrect an earlier application for disclosure. In response, the defendant produced a letter addressed to Mr Suzer dated 21st December asking for confirmation that the document that had been produced was indeed a copy of the one executed by the Charterers. In reply, Mr Suzer had dispatched a copy of the document, initialled on each page and with the notation: "I hereby confirm that this is the Charter Party referred to in my witness statement".

g) On 18th January 2001, the defendant's solicitors provided a further statement. This referred to the fact that, prior to the executed charterparty being sent back for signature by the Charterers, it had apparently been scanned into Epsilon's electronic database. The document that had already been produced was, it was accepted, made up of the first and last pages of the Charter Party sent by Caspi, with the central section derived from the database because it was said to be more legible. Epsilon now provided what was said to be a copy of the original document sent by Caspi.

h) Once again, the assistance of a forensic expert was sought by the claimant. She reported on the 24th January that the copy of the "original" was simply a further copy of the document that had been produced earlier.

i) The following day, this Court made an order for disclosure, in both hard copy and electronic form, of all relevant documents, including the documents said to have been scanned into the Epsilon database and the computer log evidencing the date on which it was scanned.

j) This hearing commenced on the 31st January 2002. There was only time during the course of the day set aside for the hearing for counsel for the

claimant to complete his submissions. Since the defendant had not been able to respond properly to the Order that had been made on 28th January, I ordered an adjournment until the 28th February and also ordered that an explanation be tendered in statement form from Captain Ioannou as regards discovery. I further agreed that he should be permitted to give oral evidence.

k) In the statement produced in response, Captain Ioannou accepted that the alleged copy of the original was simply a further copy of the earlier document onto which bogus fax and printer headers had been added. This was said to have been attributable to panic on part of a junior member of Epsilon's staff. He also confirmed that, so far as documentation from Caspi was concerned, he had only received the first and last pages of the Charter Party document which had been forwarded to him on 31st October.

l) On 22nd February, Moore-Bick J made a further order requiring Captain Ioannou to provide further details of the technique used to add fax headers, producing all relevant documents.

m) In the meantime, Captain Ioannou had sent an e-mail to the claimant's solicitors, attaching the documents said to have been scanned into the Epsilon IT system. A review of the header information on that e-mail by a computer expert retained by the claimant revealed that, at the time of transmission of the e-mail, the clock on Epsilon's computer system had been reset for the 27th March 2001 at 13.54. The claimant accordingly challenged the assertion, said to be supported by the computer log, that the file had been created and/or modified in March 2001 rather than in February 2002.

n) On the eve of the resumed hearing, Captain Ioannou filed a further statement in which he accepted that he had indeed changed the date on the computer with a view, he claimed, to enable him to recover the files created on that date.

20. The hearing resumed with the cross-examination of Captain Ioannou. At completion of his evidence, it was clear that there was insufficient time to complete the argument on all the issues in the time available. This situation was made all the more troubling by the fact that the parties had already invested something in the region of £250,000 in terms of costs on the jurisdictional dispute.

21. Against that background, I sought to persuade the parties that the costs were disproportionate to the sums at stake, let alone when incurred in the context of a threshold jurisdictional point. The underlying objective as I understood it from the defendant's point of view was not simply to insist on a private arbitral venue in London rather than in a public curial venue in Poland but also, in the process, to undermine the reliance on Polish law in support of the arrest proceedings following the change of ownership.

22. Whilst recognising these interests as legitimate, I expressed the view that the parties would be better engaged in spending their money on attempting to resolve the merits of the claim by way of mediation. The parties, albeit accepting the soundness of my concerns, nonetheless invited me to take advantage of the time available to conclude the argument on the issue of incorporation but based on the assumption that English law was applicable. A judgment on that issue might enable, it was said, the parties to resolve their other differences without further expense. I accepted that suggestion.

The recap telex

23. It is common ground that the reference to the "Charter Party" in clause 1 of the bill of lading refers to a document or documents. An oral agreement would not constitute the referenced item. It is also common ground that it must have been agreed and reduced to writing when the

bill of lading was issued. On the assumption that no formal charterparty was drawn up and executed by, or as of, that time, the question arises whether the recap telex, either alone or taken with the standard form referred to in the telex confirmation, can constitute the "Charter Party". It is convenient to take that issue first.

24. It was the claimant's submission that the re-cap telex and the associated documentation did not constitute a Charter Party for the purposes of the clause. The principal reasons appeared to be as follows:-

    i) The use of the initial capital letters suggested a significant degree of formality.

    ii) This view was supported by dictionary definitions referring to "charters" or "deeds".

    iii) The reference to a single document was inconsistent with a group or collection of documents being referred to.

    iv) All the more when the outcome would otherwise be the need to embark on a degree of detective work to "tease out" the terms of the agreement.

25. The claimants derived some support for their approach from the decision of His Honour Judge Diamond QC in **The Heidberg** [1994] 2 Lloyd's Rep 287. The Judge was there concerned with a fixture agreed over the telephone. It was followed up by a re-cap telex. The re-cap telex was in fact erroneous in referring to the wrong standard form of charterparty (which contained a Paris arbitration clause) in comparison with that which had been agreed (which contained a London arbitration clause). Although in due course, the charterers sent a form of charterparty to the owners for signature, that was not acted on as the casualty had already occurred.

26. Amongst the many issues upon which the judge was asked to rule was whether "an incorporation clause in a Bill Of Lading can have the effect of incorporating oral terms which have not been reduced into writing". Having set out his reasons for concluding that it would be commercially unsound to hold that a Bill of Lading (in like terms to the present) was capable of incorporating the terms of an oral agreement, the judge concluded:

    > *"I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of the charterparty which, at the date of the bill of lading, is issued, had not been reduced to writing. For the reasons given earlier, an oral contract evidenced only by a re-cap telex, does not seem to me to qualify for this purpose."*

27. I am unable to accept the claimant's submission:-

    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 charterparties in the form of deeds.

    ii) Whilst 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 charterparty is unnecessary: **Lidgett v. Williams** (1845) 4 Hare 456.

iii) The terms can be readily identified from the contents of the re-cap telex and the standard form to which it refers. Indeed, freight was payable (and paid) according to the terms of the very same charterparty.

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** [1878] 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**

28. I fully accept and adopt the decision in *The Heidberg* to the extent that the transferee of a bill of lading should not be affected by oral terms. But I cannot accede to the further proposition, that where the contract is contained in or evidenced by a re-cap telex, this does not qualify for the purposes of having been reduced to writing. This conclusion of His Honour Judge Diamond QC was expressed to be "*for the reasons given earlier*". The only earlier reference to this matter is in his comment at page 310 rhc:

> *Mr Dunning's submissions can only suggest, at most, that where an oral contract is evidenced by written documents such as a "recap telex", the terms set out in that document may perhaps be treated as capable of being incorporated into a bill of lading. The argument cannot reasonably be pressed so far as to suggest that an oral term, which is not contained in or evidenced by any document at all, is capable of being incorporated.*

29. In my judgment, commercial realities are wholly inconsistent with the claimant's submission. Indeed, the claimant was aware of and had approved the fixture. I find the "Charter Party" referred to in the bill of lading was the agreement contained in the re-cap telex (and the standard form to which it refers). This conclusion seems to me to accord with the duty on the Court to give an intelligent meaning to documents surrounding this commercial transaction.

Human Rights

30. It was submitted that the court should be particularly cautious with regard to reaching this conclusion (or at least as regards the next stage of treating the express reference to the arbitration clause as sufficiently incorporated) in the light of the Human Rights Act 1998.

31. This argument in my judgment is misconceived. The provisions of the Act were not engaged. Article 6 is not material to the issue whether, as a matter of law, an agreement for arbitration has been entered into. A right to a public hearing can be waived so long as the waiver is clear and unequivocal. There is no basis for the assertion that the Human Rights Act requires the court to adopt a "reluctant" approach to the incorporation of an arbitration and/or choice of law clause into a Bill of Lading.

An executed charterparty

32. Strictly speaking, this conclusion makes it unnecessary to resolve the issue whether or not a formal charterparty was executed prior to the completion of discharge referable to a date prior to the bill of lading. However, an enormous amount of effort and expense was consumed on this issue and it is right that I should express my conclusion briefly in case I am wrong on the sufficiency of the recap telex.

33. Against the background described earlier in this judgment, Captain Ioannou came to give oral evidence and was cross-examined to considerable effect. The defendants accepted that his evidence "*at best was confused and demonstrated that there has been, and continues to be, a regrettable failure to give proper weight and consideration to the serious allegations that have been made in relation to the manner in which Epsilon has dealt with documents."* This was a realistic concession. Captain Ioannu's evidence was in many respects inaccurate, unreliable and lacking in frankness. I am compelled to disregard it save to the extent that it is supported by reliable independent evidence.

34. For this the defendant relied on the written statement of the charterer's broker, Mr Suzer, of Caspi which has already been referred to. It was his evidence that he drew up a charterparty by the 21st March 2001 and sent the original to Mr Nakis Kassos for signature on the owner's behalf. He received it back almost immediately whereupon he forwarded it to the charterers on a date prior to the 3rd April 2001. This latter date he was able to confirm, because he spoke to the charterers on the 4th April to discuss an application by the owners for an extension of the laycan date and they had already received it.

35. The dispute about the carrying capacity of the vessel caused Mr Suzer to overlook the fact that the charterers had not returned the Charter Party duly counter signed. However, in September, having been contacted by Mr Nakis Kassos, he got in touch with the charterers and received in October a faxed copy of the charterparty signed by Mr Uzon. Mr Uzon reported that he had probably signed it during April when the dispute was still underway.

36. Mr Suzer was contacted again in December. He was sent a copy of the Charter Party document forwarded by Epsilon (admittedly now established not to be a true copy of the charterparty faxed by Mr Uzon). As already indicated, Mr Suzer was asked to confirm "*whether this is the Charter Party…..referred to in your witness statement*." If so, Mr Suzer was asked to sign each page. This he duly did.

37. The claimant's case was (indeed had to be given the existence of an executed document) that this evidence was false. It was put to Captain Ioannou that no attempt to prepare an executed Charter Party was made until September when a request for it was made by the defendant and that, accordingly, Mr Suzer's evidence, in response to a request from Captain Ioannou, must be dishonest.

38. Despite the claimant's emphasis on the fact that Epsilon themselves only forwarded to London the first and last pages of the executed charterparty as received by them from Caspi (perhaps even then deriving from two different copies), I see no good grounds for rejecting Mr Suzer's evidence. If anything, Mr Suzer appears to have been reluctant to help the defendant, becoming somewhat impatient with requests for copies of the charterparty.

39. The attempts by Captain Ioannou to gild the lily are most regrettable and may have some costs implications. (In that connection, the situation may have been exacerbated by excessively hasty suspicion on the part of the claimant's legal advisors and unduly lax responses on the part of the defendant's legal advisors.) But I conclude that the defendant has adduced convincing secondary evidence that the Charter Party was duly executed in April 2001.

Conclusion

40. It follows that, on the assumption that English law is applicable, the arbitration clause referred to in the executed charterparty (alternatively in the recap telex) was incorporated into the bill of lading.

WELEX AG v ROSA MARITIME LTD (THE "EPSILON ROSA") (NO. 2)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[2002] EWHC 2035 (Comm), [2002] 2 Lloyd's Rep 701

HEARING-DATES: 14 OCTOBER 2002

14 OCTOBER 2002

CATCHWORDS:
Arbitration - Arbitration clause - Incorporation - Anti-suit injunction - Earlier proceedings held clause incorporated on assumption English law applied by virtue of art. 8(1) of Rome Convention - Whether claimant could rely on Ukraine or Swiss law to establish it did not consent to incorporation by virtue of art. 8(2) of Rome Convention - Whether defendants entitled to anti-suit injunction to restrain proceedings otherwise than by arbitration.

HEADNOTE:
The purchase contract in respect of 5394 tonnes of steel plates was evidenced by an exchange of purchase orders between the claimant Welex and Liberty Steel and Services G.m.b.H (Liberty) dated Jan. 28 and Feb. 8, 2001, respectively. The delivery terms were c.f.r. free out Szczecin, INCO Terms, 2000. The general purchase terms of Welex were applicable and included the provision:

Unless otherwise agreed, bills of lading tendered under CIF and CFR contracts may be issued incorporating terms of any Charter Party.

On Mar. 19, 2001 Caspi Cargo Lines (Caspi) acting on behalf of charterers sent a recap telex dated Mar. 19, 2001 which included inter alia "ARB IN LONDON ENGLISH LAW TO APPLY" and "Cl. 47: As written by hand 'London'." The accompanying standard form had been amended in manuscript in that cl. 47 read: "Arbitration if any to be settled in London in accordance with the Rules of the LMAA".

In reply Epsilon had stated that the recap telex was in order and that the vessel Epsilon Rosa was fully fixed. Liberty then sent a fax to Welex (Deutschland) G.m.b.H. on Mar. 16 confirming the fixture of Epsilon Rosa and Welex (Deutschland) responded on Mar. 20 giving bill of lading instructions in a fax copied to Welex.

By a contract of carriage contained in or evidenced by a bill of lading between Welex A.G. (Welex) as consignees/receivers and Rosa Maritime Ltd. (Rosa) as owners of Epsilon Rosa, 5394 tonnes of steel plates were to be shipped from Mariupol, Ukraine to Szczecin, Poland.

The bill of lading dated Apr. 9, 2001 was on the Congenbill form expressly "to be used with Charter-parties". The shippers were Ilyich Iron and Steel Works and the consignee was named as "Korympic Steel International G.m.b.H. on behalf of Welex A.G." The bill of lading was claused by various ship's remarks that the cargo had been stored in the open, was wet before shipment and exhibited some rust and cl. 1 provided inter alia:

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

On May 1, the vessel arrived at the discharge port of Szczecin. During discharge the claimant's

surveyors found the cargo to be damaged and it was their view that the cargo had been wetted by seawater probably through leaking hatch covers.

On May 31, 2001 the vessel was sold by Rosa to Alexia Navigation Ltd. (Alexia). On July 16, 2001 the claimant instituted arrest proceedings in the Maritime Court in Lisbon against Rosa and Alexia. Epsilon Rosa was arrested on July 19.

On Sept. 4, 2001 the claimant filed a claim with the District Court of Szczecin against Rosa and Alexia claiming compensation of U.S.$868,564.

On Sept. 18, 2001 Alexia applied to lift the arrest at Lisbon but the application was dismissed.

On Sept. 19, 2001, Rosa commenced arbitration proceedings in London pursuant to the fixture evidenced by the recap telex.

Welex sought a declaration that no arbitration agreement was incorporated into the contract of carriage and Rosa applied for an anti-suit injunction restraining Welex from continuing the proceedings that it had commenced against Rosa in Szczecin, Poland or otherwise prosecuting proceedings against Rosa other than by way of arbitration that had been commenced.

Rosa submitted that a charter-party had been executed so that the arbitration clause within it was incorporated in the contract of carriage evidenced by the bill of lading; alternatively, in the event a charter-party had not been executed, nonetheless the recap fax and the associated documentation was sufficient to constitute the charter-party for the purposes of incorporation.

-Held, by Q.B. (Com. Ct.) (David Steel, J.), that the arbitration clause referred to in the charter-party executed by the parties was incorporated into the bill of lading issued by the master of Epsilon Rosa on the defendant's behalf on Apr. 9, 2001; however this conclusion was premised on the assumption that English law was applicable by virtue of art. 8(1) of the Rome Convention as enacted in the Contracts (Applicable Law) Act, 1990.

The issues before the Court were (1) whether the claimant (Welex) was entitled to rely on the laws of Ukraine or Switzerland to establish that it did not consent to the incorporation of the arbitration clause by virtue of art. \pard softline8(2) of the Rome Convention; (2) if not whether the defendant (Rosa) entitled to an anti-suit injunction to restrain the claimant from pursuing proceedings otherwise than by arbitration.

Article 8 of the Rome Convention provided inter alia:

(1) The existence and validity of the contract, or any term of the contract shall be determined by the law which would govern it under this Convention . . . (2) Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent to it if it appears that. . .it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

On the assumption that Welex could rely on the law of its habitual residence (Switzerland) it would thereby establish, that it did not consent to the arbitration clause because (1) under Swiss law Welex, would be bound to such terms as the original shipper had consented to; (2) under Ukraine law the shippers were not bound by the arbitration clause.

The determinative issue was whether it appeared that it would not be reasonable to determine the effect of Welex's conduct in accord with English law.

-Held, by Q.B. (Com. Ct.) (David Steel, J.), that (1) the burden was on Welex to displace the effect of art. 8(1); the shippers presented the Congenbill to the master for signature; it was not suggested that there was anything unreasonable in holding Welex to the contract of carriage as a whole; an arbitration clause was commonplace in contracts of this kind; in due course Welex succeeded to the shippers rights and obligations; and there was nothing "eccentric" let alone unjust in the English law to hold that both shipper and consignee were bound by the terms of the dispute resolution clause (see p. 704, cols. 1 and 2);

(2) the transaction was an entirely convential one, nothing in the circumstances rendered it unreasonable to determine the effect of Welex's conduct by reference to English law (see p. 704, col. 2);

(3) as to the anti-suit injunction, Welex had not shown sufficiently strong reasons to displace Rosa's entitlement to enforce the contractual bargain that there should be arbitration in London and an anti-suit injunction would be granted (see p. 706, col. 2).

INTRODUCTION:

These were further issues raised by the claimant Welex A.G. and the defendant, Rosa Maritime Ltd as to whether Welex was entitled to rely on the law of Ukraine and Switzerland to establish that it did not consent to the incorporation of the arbitration clause; if not whether Rosa was entitled to an anti-suit injunction to restrain the claimant from pursuing proceedings otherwise than by arbitration.

The further facts are stated in the judgment of Mr Justice David Steel.

COUNSEL:

Mr Graham Dunning QC and Mr Ricky Diwan for the claimant; Mr MN Howard QC and Ms Karen Troy-

Davies for the defendant.

PANEL: David Steel J

JUDGMENTBY-1: DAVID STEEL J

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DAVID STEEL J: 1. In an earlier judgment in these proceedings, handed down on Apr. 25, 2002 ([2002] EWHC 762 (Comm)) and reported at [2002] 2 Lloyd's Rep. 81); [2002] 1 All E.R. (Comm.) 939, I held that the arbitration clause referred to in the charter-party executed by the parties (or, alternatively, contained in an earlier recap telex) was incorporated into the bill of lading issued by the master of the Epsilon Rosa on the defendant's behalf on Apr. 9, 2001. However, this conclusion was premised on the assumption that English law was applicable to the issue by virtue of art. 8(1) of the Rome Convention as enacted in the Contracts (Applicable Law) Act, 1990.

2. The Court is now concerned with two further issues:

(1) Is the claimant (Welex) entitled to rely on the law of the Ukraine and/or Switzerland to establish that it did not consent to the incorporation of the arbitration clause by virtue of art. 8(2) of the Rome Convention?

(2) If not, is the defendant (Rosa) entitled to an anti-suit injunction to restrain the claimant from pursuing proceedings otherwise than by arbitration?

3. For the sake of clarity I repeat the factual background as set out in my earlier judgment at pars. 2-9 inclusive:

(2) The dispute relates to a shipment of 5394 tonnes of steel plates from Mariupol, Ukraine, to Szczecin, nePoland on board the Epsilon Rosa. The bill of lading dated Apr. 9, 2001, was on the Congenbill form expressly "to be used with Charterparties". The shippers were Ilyich Iron and Steel Works. The consignee was named as "Korympic Steel International GmbH on behalf of Welex AG".

(3) The bill of lading was claused by various ship's remarks that the cargo had been stored in the open, was wet before shipment and exhibited some rust. There was a typed clause to the effect that "freight payable as per Charter Party". There was also a box, which had not been filled in, that read: "Freight payable as per CHARTERPARTY dated.. . ." On the reverse cl. 1 read: "All the terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated". The focus of the dispute between the parties was whether there was, at any material time, a "Charter Party" and whether the arbitration clause contained within it was incorporated into the bill of lading by virtue of cl. 1.

(4) The purchase contract was evidenced by an exchange of purchase orders between Welex and Liberty Steel and Services GmbH (Liberty) dated Jan. 28 and Feb. 8, 2001 respectively. The delivery terms were c.f.r. free out, Szczecin, INCO Terms, 2000. The general purchase terms of Welex were applicable. They included the provision: "Unless otherwise agreed, bills of lading tendered under CIF and CFR contracts may be issued incorporating terms of any Charter Party". Notably, while INCO Terms, 1990 stipulated that the seller must provide a copy of the charter-party, this requirement had been deleted in INCO Terms, 2000.

(5) The master signed the bills of lading on Apr. 9, 2001. The same day, the charterers intimated a small claim for short shipment. The owners' response on Apr. 12 was a demand for payment of the freight in full, pending particularisation of any claim. The charterers made a proposal on Apr. 13 for payment of freight, less a shortage of 100 tonnes and other expenses. This freight claim was in due course settled on about Apr. 20.

(6) On May 1, the vessel arrived at the discharge port of Szczecin. During discharge, the claimant's surveyors found that the cargo was damaged. It was their view that the cargo had been wetted by seawater, probably through leaking hatch covers.

(7) On May 31, 2001, the vessel was sold by Rosa to Alexia Navigation Ltd. (Alexia). The Maltese register was duly amended to that effect in June, 2001. On July 16, 2001, the claimant instituted arrest proceedings in the maritime Court in Lisbon. These proceedings were instituted against both Rosa and Alexia. Despite the sale, Epsilon Rosa was arrested on July 19 following a short oral hearing. On Sept. 4, the claimant filed a claim with the District Court of Szczecin against both Rosa and Alexia claiming compensation in the sum of U.S.$868,654. It was the claimant's contention that the claim carried a lien irrespective of the change of ownership, pursuant to the Polish Maritime Code.

(8) On Sept. 18, the new owners applied to lift the arrest in Lisbon. This application was dismissed, although security was ordered in the reduced sum of U.S.$596,463. Nonetheless, Alexia's club refused to pay security on the grounds that it was not liable in respect of the claim. Rosa's club also refused to furnish security on the grounds that its member no longer owned the vessel.

(9) This unfortunate impasse has led to the vessel remaining under arrest to date since there is no provision for sale pendente lite under Portuguese law. This situation was rendered all the more unattractive by the fact that the vessel's value is no more than U.S.1 m. even before the deduction of the costs of arrest and any other prior claims.

4. The only pertinent development since the judgment has been a further judgment of the Portuguese Courts dated July 2, 2002 in response to a second application by Alexia for the release of the vessel from arrest. This application was apparently prompted by a desire on Alexia's part to resell the vessel, which had now been under arrest for over a year. It seems that Alexia concurrently decided to abandon its claims against Rosa arising out of the earlier sale. The basis of the application for release was the tender of a guarantee securing all Welex's claims against Alexia. This guarantee, however, did not purport to encompass a claim against Rosa.

5. The Court held that such a guarantee was not suitable in the context of a claim in rem. However Alexia has since confirmed the restricted scope of their offer of a guarantee and has also made it clear in correspondence that it is not willing to put up security which would respond to a London arbitration award against Rosa. It follows that the hope expressed in my earlier judgment that the parties might reach a compromise on the merits rather than spend a disproportionate amount of costs on disputes as to jurisdiction has proved forlorn.

6. Article 8 of the Rome Convention reads as follows:

(1) The existence and validity of the contract, or of any term of a contract shall be determined by the law which would govern it under this Convention if the contract or term were valid.

(2) Nevertheless, a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears that in the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

7. I am minded to assume that if Welex were able to rely upon the law of its habitual residence (Switzerland), it would thereby establish that it did not consent to the arbitration clause because: (a) under Swiss law, Welex would be bound to such terms which the original shipper had consented to; (b) under Ukrainian law, the shipper (Ilyich Iron and Steel Works) were not bound by the arbitration clause.

8. On that assumption the determinative issue is accordingly whether it appears from the circumstances that "it would not be reasonable to determine the effect" of Welex's conduct in accord with English law. Some guidance on this test is to be derived from the Giuliano and Lagarde Report on the Convention at p. 333:

The word "conduct" must be taken to cover both action and failure to act by the party in question; it does not, therefore, relate solely to silence. The words "if it appears from the circumstances" mean that the court must have regard to all the circumstances of the case, not solely those in which the party claiming that he has not consented to the contract, has acted. The court will give particular consideration to the practices followed by the parties inter se as well as their previous business relationships. According to the circumstances, the word "party" can relate either to the offeror or to the offeree.

9. It was submitted on behalf of Welex that it would not be reasonable to determine the effect of its conduct in accord with the English law because: (a) There was evidence form the manager of the transportation department of Ilych Iron and Steelworks that he was unaware of the existence of the charter-party and had not seen the bill of lading in draft or otherwise. (b) The bill of lading did not identify the charter-party. (c) Against this background, English law was "eccentric" in nonetheless providing for incorporation of the arbitration clause.

10. I am unable to accept these submissions. In so concluding, I have had well in mind the virtue of adopting what Mr. Justice Mance described as a "dispassionate, internationally minded approach": Egon v. Libera, [1995] 2 Lloyd's Rep. 65 at p. 70.

11. My reasons can be summarized as follows:

(a) The burden, in my judgment, is on Welex to displace the effect of art. 8(1). (b) The shippers presented the Congenbill form to the master for signature. (c) It is not suggested that there is anything unreasonable in holding Welex to the contract of carriage as a whole, it is only the dispute resolution provision to which exception is taken. (d) Yet an arbitration clause is commonplace in contracts of this kind, regardless of the nationality of the parties or the nature of the voyage concerned. (e) In due course Welex succeeded to the shipper's rights and obligations under the contract of carriage. (f) There is nothing "eccentric" let alone unjust in the English law in those circumstances holding that both the shipper and the consignee are bound by the terms of the dispute resolution clause.

12. In short, I regard the transaction as an entirely conventional one. Nothing in the circumstances renders it unreasonable to determine the effect of Welex's conduct by reference to English law. It is accordingly now necessary to turn to Rosa's application for an anti-suit injunction directed at the proceedings instituted by Welex in Poland.

13. Rosa predictably relied upon The Angelic Grace [1995] 1 Lloyd's Rep. 87. As Lord Bingham observed in Donohue v. Armco, [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425 the effect of that decision and those that followed it, is as follows:

24. 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 agreements 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 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.

14. Welex, however, contended that there were, on the facts, strong reasons for allowing it to proceed against Rosa in a non-contractual forum:

(a) The Court should recognize the difficulty of reconciling the granting of an anti-suit injunction in relation to proceedings instituted by a domiciliary of a Lugano Convention country. (b) The interests of another party were involved in that Alexia was also a defendant in the Polish proceedings and thus the effect of an injunction would be to create a duplicity of proceedings with the associated extra cost and risk of inconsistent decisions. (c) Poland was, from the aspects of convenience, clearly a more appropriate forum than England. (d) Welex had security in the form of the arrested vessel in respect of claims against Rosa in Poland while there were doubts whether the security was available to meet any arbitration award.

15. I recognize that the well known observations of Lord Justice Millett in The Angelic Grace, sup., at p. 386 to the effect that there is no good reason for diffidence in granting an anti-suit injunction did not meet with wholly enthusiastic support from a differently constituted Court of Appeal in Toepfer International G.m.b.H. v. Cargill France, [1998] 1 Lloyd's Rep. 379 at p. 386. The suggestion there made was that, where the forum chosen in disregard of the arbitration agreement is a New York Convention country (as is Poland), the matter of stay might be left to the Polish Court. But this point is not open before me.

16. I also recognize there is some doubt as to the practice of granting such injunctions in cases where the other forum is a country which is a party to the Brussels or Lugano Conventions: see Phillip Alexander Securities and Futures Ltd. v. Bamberger, Court of Appeal July 12, 1996, Toepfer v. Societe Cargill sup. and Civil Jurisdiction and Judgments, Briggs 3rd ed., par. 5.44 but cf. The Kribi, [2001] 1 Lloyd's Rep. 76. But again these are matters which must be aired in a higher Court.

17. The fact that Alexia is impleaded in the Polish proceedings gives rise to the risk that proceedings in Poland will continue despite an injunction in respect of the claim against Rosa. This is potentially a highly significant factor in considering whether to enforce an exclusive jurisdiction clause: The El Amria, [1981] 2 Lloyd's Rep. 219, Bouygues Offshore S.A. v. Caspian Shipping Co., [1998] 2 Lloyd's Rep. 461. But it strikes me that, on the facts of the present case, this is not a factor of great weight.

18. Alexia were the buyers of the vessel, following discharge but before the arrest. Thus, the sale as such has no implications as regards liability, only as regards enforcement. Accordingly, 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.

19. 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.

20. The foundation of Welex's concern appears to be that, since Alexia refuses to post security for the claim against Rosa, either in England or in Portugal, there is some doubt whether Welex could enforce their award in Portugal. But the recent decision of the Portuguese Court should allay those fears:

In fact, the arrest in question was directed, as it should be against the owner of the vessel at the time of the events and against the current owner of the vessel. And the main proceedings were also instituted against both companies therefore the hypotheses raised by the defendant WELEX and ALEXIA may be acquitted may indeed become a reality. Such a hypothesis is not at all theoretical and should it become a reality then a guarantee given in these terms would be inefficient even if ROSA MARITIME defendant in the main proceedings were to be condemned.

Once the arrest was lifted, one would be left with a guarantee that could not be used by the part that in the proper arrest proceedings had proved to be entitled to benefit from a guarantee, which in the first place is the vessel in rem.

It is not acceptable to consider a guarantee issued in these terms as being suitable.

21. As regards questions of convenience, 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 English 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.

22. This leads to a further consideration that was not argued in The Angelic Grace but was considered at first instance in Toepfer v. Cargill, [1997] 2 Lloyd's Rep. 90 at p. 110. The argument arose from the fact that the New York Convention leaves little or no room for discretionary flexibility in the enforcement of an arbitration clause:

. . .why should the English Courts in exercising their jurisdiction to restrain foreign proceedings by injunction give weight to such matters as forum non conveniens criteria or the risk of inconsistent decisions when those matters are entirely extraneous to the regime created by the convention? I can see no good reason why they should. To do so would simply derogate from adherence to the Convention: per Mr. Justice Colman at p. 110.

23. These observations were not subject to comment by the Court of Appeal. However I find them persuasive. I treat these considerations as of little weight. I have not forgotten that the exercise of discretion can also properly reflect the spectrum of arbitration clauses, from those which have been fully negotiated to those contained in standard terms. The present case is, I recognize, towards the latter end of the spectrum: cf. The Borgen, [1997] 2 Lloyd's Rep 710. But, on balance, I conclude that Welex has not shown sufficiently strong reasons to displace Rosa's entitlement to enforce the contractual bargain that there should be arbitration in London and I grant the anti-suit injunction.

DISPOSITION:
Judgment accordingly.

SOLICITORS:
Stephenson & Harwood; Brookes & Co

Neutral Citation Number: [2003] EWCA Civ 938
Case No: A3/02/2230
A3/02/2231

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
3rd July 2003

B e f o r e :
LORD JUSTICE BROOKE
LORD JUSTICE MAY
and
LORD JUSTICE TUCKEY

_____

Between:
WELEX A.G.
Appellant

- and -

ROSA MARITIME LIMITED
Respondent

_____

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)

_____

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

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Lord Justice Tuckey:

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

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.

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.

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: à.
>
> 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.

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.

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.

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 claused 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.

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.

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.

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.
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.
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.
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.
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.
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.
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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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.

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".

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

I would dismiss both of Welex's appeals.

Lord Justice May: I agree.

Lord Justice Brooke: I also agree