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Case No: 2001 Folio 186
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT
Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 4 October 2001
B e f o r e :
THE HONOURABLE MR JUSTICE COLMAN
- -

SONATRACH PETROLEUM CORPORATION (BVI)Claimant
- and -
FERRELL INTERNATIONAL LIMITEDDefendant

- -
- -
Mr R Thomas (instructed by Messrs Clyde & Co for the Claimants)
Mr J Bignall (instructed by Messrs Ince & Co for the Defendants)
- -
JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL
CORRECTIONS)
Mr Justice Colman :
Introduction
This is an application under section 9 of the Arbitration Act 1996 for an order staying part of the claims in the action on the grounds that the parties have agreed to refer such disputes to arbitration. It raises somewhat unusual issues because of the unusual nature of the arbitration and jurisdiction clause.
Sonatrach, a British Virgin Islands Corporation, were sub-charterers of the NOTO GLORIA from Ferrell, an English company, under a time charter, “the Sub-Charter”, subsequently extended from 8 to 14 months, made on about 10 December 1997.
Ferrell had time-chartered the vessel from Mitsui Oil and Gas Co Ltd (“Mitsui”) a Japanese Corporation, under a time charter, “the Head Charter”, dated 14 January 1997.
The arbitration and jurisdiction clause in the Sub-Charter modified the arbitration clause in the Head Charter. It provided for disputes to be

determined in the English courts in accordance with English law or by arbitration in Japan in accordance with Japanese law, depending on the nature of the dispute. The defendants submit that most of the issues raised in the Particulars of Claim fall within the scope of the arbitration clause and must be referred to arbitration in Japan. The claimants contend that on the proper construction of the arbitration and jurisdiction clause, all their claims fall outside the agreement for arbitration. They submit in the alternative that the arbitration and jurisdiction clause is unenforceable.

The Sub-Charter was negotiated between Captain Stavros Samartzis of Sonatrach and Mr Paul Nash of Ferrell. The negotiations led to an agreement expressed by way of amendments to the Head Charter. Essentially, they created a sub-charter which was partially back-to-back with the Head Charter, save that the Sub-Charter was for a period of 8 months, commencing in the first 10 days of January 1998, whereas the Head Charter was for 3 years. The Sub-Charter was extended from 2 October 1998 by an addendum of 4 September 1998 for a further 6 months 20 days more or less in charterers' option.

The parties intended to draw up a sub-charter document to reflect their agreement expressed in the fax, but they do not appear to have done so. The result is an unusual document which has to be read side by side and by reference back to the Head Charter.

Clause 46 of the Head Charter was on the BP Time Form, amended to provide as follows:

"This Charter shall be construed and the relations between the parties determined in accordance with the law of Japan", the word "England" having been deleted.

There was then in substitution for lines 328-330 the exclusive jurisdiction of the High Court in London, which were deleted, the following arbitration clause:

"If any dispute arises concerning this Charter between the parties thereto, either of the parties shall submit the same to arbitration of The Japan Shipping Exchange, Inc, (Tokyo), and the award given by the arbitrators appointed by the said Exchange shall be final and binding on both parties. All matters relating to the appointment of arbitrators and arbitration procedure shall be decided by Maritime Arbitration Rules of the said Exchange."

The Sub-Charter, as expressed in the fax message, contained the following:

"Clause 46: Add Marginal Notation "see additional clause 78"

Clause 78: Law and Arbitration

Notwithstanding the provisions of clause 46 herein, in cases where the dispute may arise between Dispondent owner (Ferrell) and Charterer (SPC), rather than with head owner, then such dispute shall be governed by the unamended wording of lines 328-330 inclusive of the printed charter form."

The unamended wording of lines 318-320 of the Head Charter was as follows:

"This Charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter".

The Submissions

It is submitted by Mr John Bignall on behalf of Ferrell that the effect of these unusual provisions is that clause 78 applies to all those disputes under the Sub-Charter which do not involve or potentially involve a dispute between Ferrell and Mitsui under the Head Charter and which do not relate to any claim by or give rise to any claim against Mitsui by Ferrell under the Head Charter. Where a claim involving Mitsui arises, that is to be governed by Japanese law and is to be resolved by Japanese arbitration in order to match up with the

Head Charter under which that claim would or might be brought by Mitsui against Ferrell or be passed on by Ferrell against Mitsui. As Mr Bignall puts it, given that the Sub-Charter is stated expressly to be back-to-back with the Head Charter, a sensible construction of clause 78 would be that where any dispute under the Sub-Charter is not independent of the Head Charter it is to be determined between all parties in the same forum, viz by Japanese arbitration, and according to the same system of law. By contrast, given that both Sonatrach and Ferrell have offices in London, and that both are incorporated in Common Law jurisdictions (Sonatrach in the British Virgin Islands and Ferrell in England), it is commercially logical for them to want their disputes to be resolved by an English court and by reference to English law rather than by Japanese arbitration and Japanese law, provided that the resolution of those disputes would have no relevance to the legal relationship between Ferrell and Mitsui. It is submitted that typical claims under the Sub-Charter which would be outside clause 46 but within clause 78 would be claims relating to the payment of money in circumstances where the alleged right to payment did not involve a breach by Mitsui against Ferrell or vice versa, such as payment of hire or cancellation for non-payment of hire.

On behalf of Sonatrach, claimants in the action and respondents to this application, it is submitted by Mr Robert Thomas that, on its proper construction, clause 78 has the effect of (i) requiring all claims as between Sonatrach and Ferrell to be governed by English law and to be subject to the jurisdiction of the English courts and (ii) reserving to Japanese law and Japanese arbitration claims under any bills of lading to which Mitsui was a party which might incorporate the terms of the Sub-Charter, including the law and jurisdiction clause. Reliance is particularly placed on the words in clause 78 “where the dispute may arise between Disponent Owner (Ferrell) and Charterer (SPC), rather than with Head Owner ....” (emphasis added) as envisaging a dichotomy between disputes between (i) Sonatrach and Ferrell and (ii) disputes between Sonatrach and Mitsui founded on the duties of Mitsui under the bills of lading.

Secondly, it is submitted that the construction put forward on behalf of Ferrell is so completely impracticable that it cannot have been mutually intended. The impracticability is said to arise from the entitlement to set off against outstanding hire amounts due from the disponent owners to the sub-charterers. Thus, under clause 13 of the Head Charter, which was incorporated into the Sub-Charter, it was provided:

“Payment of the said hire shall be made in US Dollars monthly in advance less: (1) any advances for disbursements made on Owners’ behalf; (2) any amount or expenses in respect of actual or estimated off hire periods; (3) any expenses incurred by Charterers which may reasonably be estimated by them to relate to such off hire periods and (4) any amounts due or estimated to become due to Charterers under the terms of Clause 5 hereof. Any adjustments shall be made at the due date for the next monthly payment or as soon as possible after the facts have been ascertained.

In the event of such payment not being made on the due date, Owners shall notify Charterers whereupon Charterers shall make payment of the amount due within seven days of receipt of notification from Owners, failing which Owners shall have the right to withdraw the vessel from the service of Charterers, without prejudice to any claim Owners may otherwise have on Charterers under this charter.”

Clause 5 provides for compliance of the vessel with its description and the reduction of hire in order to indemnify charterers for the failure of the vessel to comply with its description. This would include speed and

consumption warranty claims. It is to be observed that this clause introduces a contractual entitlement to reduction of hire in such cases. It is argued that the parties could not sensibly have intended that a claim for hire would be litigated in the English Courts subject to English law whereas a claim for the hire to be reduced on grounds of, for example, breach of the speed and consumption description or for off hire periods would be arbitrated subject to Japanese law in Japan. A claim for hire could be brought in the English courts, whereas if there were a defence and counterclaim which involved allegations of breach of the description, that would have to be separately arbitrated in Japan, leaving it to Ferrell to recover judgment on its claim for hire without set-off or other deductions.

Finally, it is submitted in the alternative on behalf of Sonatrach that, if Ferrell's construction is correct, clause 78 may be unenforceable on the grounds that it introduces a floating choice of law which depends upon the nature of the dispute raised in relation to each claim. Just as a floating choice of law clause is invalid, so also is an associated floating choice of forum provision. Mr Thomas relies on the decision of the Court of Appeal in Armar Shipping Co Ltd v. Caisse Algerienne [1981] 1 WLR 207 and on the decision of Bingham J. in The Iran Vojden [1984] 2 Lloyd's Rep 380. This, however, is very much Sonatrach's secondary case. Its primary case, which I have described, gives rise to no similar question of invalidity.

Analysis

Clause 78 is expressed as an exception to or derogation from clause 46. Both of them form part of the Sub-Charter. Clause 46 refers to "any dispute (which) arises concerning this Charter between the parties thereto". Clause 78 refers to "cases where the dispute may arise between Disponent Owner (Ferrell) and Charterer (SPC) rather than with Head Owner". In that context "the dispute" refers back to a clause 46 dispute to the extent of being one which (i) concerns the Sub-Charter and (ii) arises between the parties to that charter. The words "rather than with Head Owner" in their context are, in my judgment, directed to defining by exception those "disputes" which arise exclusively between the parties to the Sub-Charter and are not disputes which arise both between those parties and in addition involve some related dispute with the Head Owner. In other words only those disputes which are completely insulated from and are incapable of giving rise to issues in respect of the rights and obligations of the Head Owner, Mitsui, under the Head Charter are to be subject to English law and jurisdiction.

This construction is significantly more consistent with the commercial setting than that put forward on behalf of Sonatrach to the effect that clause 78 is intended to cater for disputes under bills of lading issued to the Sub-Charterer, Sonatrach, to which the Head Owner, Mitsui, is a party and which incorporate the law and jurisdiction clause of the Sub-Charter. There are three problems with this argument which cumulatively suggest that it is unsustainable, if not far-fetched.

(i) The words used in clause 78 are not those which any ordinary shipping man would be expected to use to achieve that result. There is, as I have explained, nothing in the wording to suggest that it is directed to disputes involving direct claims by the Sub-Charterers upon the Head Owner: its obvious meaning is to refer to disputes involving all three parties. Its commercial purpose is to achieve for such disputes uniformity of proper law and uniformity of tribunal.

(ii) The parties to the sub-charter were contracting on the basis of the Head Charter which described Mitsui as disponent owner. It would be unusual for a disponent owner under a time charter who had sub-let the vessel, and who was

not also a bareboat charterer, to become a party to bills of lading issued to a shipper: one could ordinarily have expected the bills of lading to be issued by the registered owners and signed by the master or on his behalf.

(iii) Although it is quite common for bills of lading to incorporate the terms of a charterparty, it is very much less common for them to incorporate a law and jurisdiction clause from a charterparty. General words of incorporation would not usually be sufficient: there would ordinarily have to be an express reference to the jurisdiction clause, as there would have to be to an arbitration clause: (see OK Petroleum AB v. Vitol Energy SA [1995] CLC 850 and Anonymous Greek Co of General Insurances 'The Ethniki' v. AIG Europe (UK) [2000] CLC 446.

However, the argument involves the incorporation of clause 78 from the Sub-Charter, as well as clause 46. The assumption is therefore that the Head Owner not only issues bills of lading but that it incorporates the arbitration and law and jurisdiction clause from a sub-charter to which the Head Owner was not a party. This is intrinsically improbable.

As to the argument advanced on behalf of the Sub-Charterer that the parties could not have intended to create a dual adjudication regime in view of the problem that would be likely to arise, particularly in relation to the setting off of claims for charter hire and cross claims for such matters as breach of description as to speed and consumption or off-hire, the problems identified are, in my judgment, much exaggerated. If and in so far as the claim for unpaid hire is the obverse of a cross-claim for off-hire or for reduction in hire due to breach of some aspect of the description, then, provided that the cross-claim was such as to involve the rights or obligations of the Head Owners vis a vis Ferrell, the "dispute" between Ferrell and Sonatrach would not be one accurately described as arising between them alone so as to engage the operation of the English law and jurisdiction clause under clause 78. If, however, it were possible to identify an issue, for example whether on the proper construction of the Sub-Charter Ferrell was entitled to withdraw the vessel for non-payment of hire, and that was a discrete issue the resolution of which was wholly incapable of affecting the rights or obligations of the Head Owners under the Head Charter, that issue alone would fall within the exception to the jurisdiction of the arbitrators under clause 78 and would have to be determined by the English courts.

In the more complicated circumstances of a hybrid case in which there was alleged wrongful withdrawal and alleged cross-claims or deductions from hire, the jurisdiction over the distinct and separable aspects of the claim and cross-claims, depending on whether they raised issues exclusively between the Sonatrach and Ferrell would be divided between Japanese arbitration and the English court without any insuperable procedural dislocation. This could be accomplished by means of a declaratory arbitration award or judgment or by execution of a judgment being stayed, depending on which tribunal first determined the issue before it. It is not by any means unusual to encounter inconsistent jurisdiction provisions as between head charters and sub-charters. Although they may make it more complicated to draw up a final account of what is due under the sub-charter, the real difficulties arise where disputes under one charter are related to disputes under the other charter and it was those difficulties which the parties appear to have tried to address by clause 78.

Since the submission as to the intrinsic invalidity of a provision importing a floating proper law and providing for floating jurisdiction has been deployed by Mr Thomas on behalf of Sonatrach both as an aid to construction of clause 78 and, albeit very much as a secondary argument, as an independent point the

effect of which, if correct, would be that the clause was rendered unenforceable, I must now consider this more fully.

Floating Proper Law and Jurisdiction Clauses

The essence of the submission on behalf of Sonatrach is that clause 78 should not be construed as having the meaning advanced by Ferrell because it could not have been the mutual intention to introduce a provision unenforceable on the ground that it created a "floating" proper law.

In support of this proposition Mr Thomas relied on the decision of the Court of Appeal in Armar Shipping Co ltd v. Caisse Algerienne, supra. That was an application to set aside service of a writ on an Algerian insurance company in respect of a claim by Cypriot shipowners under a Lloyd's average bond for sacrifices and expenditure in general average due to the grounding of the vessel in the course of the voyage. The plaintiffs had obtained leave under Order 11 r.1(i)(f) on the ground that the claim was for breach of a contract governed by English law. There was no express choice of law clause and the plaintiffs relied on the submission that it was with English law that the contract had its closest and most real connection. Upon the application to set aside service Mustill J. reached the conclusion that the bond was governed by English law, relying upon the fact that the general average adjustment was an English adjustment and was governed by English law. However, under the bond no provision specified the place of the adjustment, but an express term of the bills of lading provided that the carrier was to have the right to select the place of adjustment. This provision was not incorporated into the bond and it was not established that the defendant insurers of the cargo had notice of it.

The Court of Appeal concluded that the plaintiffs had not established that the bond was governed by English law. In giving the only judgment, Megaw LJ. referred at page 215 to the essence of the judge's reasoning:

"the proper law can be regarded as 'floating' until such time as the exercise of a choice by the carrier had the effect of fixing both governing laws at the same time".

Megaw LJ. continued:

"But can this really be so? Counsel for the defendants submits, with what seems to me to be unanswerable legal logic, that there must be a proper law of any contract - a governing law - at the time of the making of that contract. If, as is the case here, at the time when the contract was made, the question remained undecided whether the average adjustment was to be in England or in the United States or in Germany of somewhere else, then the fact that it was subsequently decided by one of the parties that the venue should be England cannot be a relevant factor in the ascertainment of the proper law at an earlier date. As a matter of legal logic, I find insuperable difficulty in seeing by what system of law one is to decide what, if any, is the legal effect of an event which occurs when a contract is already in existence with no proper law: but, instead, with a "floating" non law.

But in my opinion the difficulty goes beyond mere technicality or legal logic. Under the terms of this Lloyd's average bond contract, things had to be done by the parties forthwith and disputes under the contract might well, as a matter of commercial reality, arise forthwith. For example, there might be an immediate dispute as to whether freight was payable, or, if so, how much freight. There might be a dispute as to whether the shipowner had duly delivered the right cargo, in the right amount, or at the right time, to the right person. Those disputes, if they were to arise, would be disputes under the terms of this contract, involving, it may be, questions as to the construction and effect of those contractual terms. It cannot be that the

contract has to be treated as being anarchic: as having no governing law which the court, taking jurisdiction in respect of such a dispute under the contract, would apply in deciding the dispute. There must be a governing law from the outset: not a floating absence of law, continuing afloat until the carrier, unilaterally, makes a decision.

The governing law cannot fall to be decided, retrospectively, by reference to an event which was an uncertain event in the future at the time when obligations under the contract had already been undertaken, had fallen to be performed and had been performed . Nor is it, I think, an attractive, or a possible, concept of English private international law that the governing law, initially being, say, the law of Algeria, should thereafter change into the law of England.

If, as I believe, the fact of the carriers' subsequent designation of England as the place of the general average adjustment cannot operate to crystallise a theretofore "floating" proper law (or to fill the gap of a theretofore non-existent proper law), the most that can be said in this case is that, when the contract was made, there was a possibility that English law might be the place of the general average adjustment. But that, as I have said, cannot, in my opinion, have the effect of making English law the governing law of the contract."

The important principles identified by Megaw LJ. for present purposes can therefore by identified as follows.

(i) A contract cannot have a proper law which is determined only retrospectively by reference to some uncertain event or selection process after the contract has already come into force and obligations under it have fallen to be performed.

(ii) The proper law of the contract could not start as, for example, that of the place where the bond was issued, in that case Algeria, and then, subsequently change retrospectively to that of England upon the carrier's choosing to have the general average adjustment drawn up in England.

Before considering the relevance of this decision to the present case it is necessary to approach the problem of a floating proper law as a matter of principle. The English law of contract gives effect, subject to the doctrine of consideration, to what the parties have agreed, save in two types of case: (i) where what has been agreed is unlawful or where enforcement would be contrary to public policy or (ii) where what has been agreed is so uncertain that the court is unable to give effect to it. It is unnecessary to exemplify category (i), but, at least in the context of jurisdiction clauses, a striking example of category (ii) is the case of Lovelock (EJR) Ltd v. Exportles [1968] 1 Lloyd's Rep 163 in which the arbitration clause provided both that "any dispute" should be referred to arbitration in London and that "any other dispute" should be referred to arbitration in Moscow. Effect could not be given to such a provision because the parties had failed to agree the means of identifying which disputes were to be arbitrated in the different venues. The nature of the uncertainty with which the courts are concerned in such cases goes to the applicability of the provision as expressed by the words used. Whereas there might well be cases where on grounds of public policy or by reason of an Act of Parliament an English would refuse to give effect to a choice of law: see for example Dynamite AG v. Rio Tinto Co Ltd [1918] AC 292 and The Hollandia [1983] 1 AC 565, the present case is concerned with the characteristic of uncertainty. The determinative question is whether the choice of law mechanism agreed by the parties in clause 78 is rendered unenforceable by uncertainty. The exercise involved does not require reference to special English conflicts of laws principles as such, but calls instead for

investigation of whether the parties have agreed a proper law in a manner which is so defined as to be applicable by the courts.

I have already held that the meaning of clause 78 is not in doubt and that one of its purposes was to match the proper law to the venue of the tribunal by which the particular dispute was to be resolved. This mode of proper law selection involved that in order to ascertain the applicable proper law it was necessary for a view to be taken as to whether a given dispute between the parties to the Sub-Charter related to or involved a dispute between the Head Charterer (Mitsui) and Ferrell. Accordingly, until the precise nature of such dispute had been identified and its relationship, if any, with Mitsui ascertained the relevant proper law would not be known. This would leave the parties to the Sub-Charter in the position where, prior to the existence of any particular dispute, but while they were seeking to give effect to the contract, they would not necessarily know for certain by reference to what body of law their rights and obligations were to be defined. In a case where one party to the Sub-Charter subsequently alleged that the other had been in breach, the allegation would necessarily involve that there had been in breach of a contract whose proper law remained undefined until after the breach had already occurred. Indeed, even at the time when the allegation of breach was made and the dispute under the Sub-Charter came into existence, it might not be known whether there was a related dispute under the Head Charter. Even though a breach alleged against Ferrell by Sonatrach might involve the assumption that Mitsui was responsible due to some breach of the Head-Charter, there might be no dispute about this between Ferrell and Mitsui, either because Mitsui admitted its breach or because Ferrell chose for its own reasons not to pass on the claim to Mitsui. Therefore the proper law applicable to a particular right or obligation under the Sub-Charter could not be identified with complete certainty at the time of performance and might even remain in limbo for some time after a dispute had occurred. Accordingly, a court might well not be able to test performance of the Sub-Charter by reference to a body of law known to be applicable at the time of performance. In my judgment, this lack of definition of the proper law and the consequent potential inability to ascertain the precise scope of the rights and obligations of the parties at the time of performance renders the choice of law regime under clause 78 impossible to apply and therefore unenforceable for uncertainty. That clause, as I have explained, clearly creates a composite proper law selection process, including clause 46. The characteristic of uncertainty thus renders both clauses unenforceable, at least to the extent to which they relate to choice of law. The parties created a choice of law regime which by reason of its intrinsic uncertainty was inconsistent with the well-established principle set out by Lord Diplock in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co [1983] AC 50 at p65:

“My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a Court of Justice for failure to perform any of those obligations .....”

This conclusion does not, however, lead to the further conclusion that the construction of clause 78 advanced on behalf of Sonatrach is correct. The parties have, in my judgment, used words which show quite clearly what they were trying to achieve in respect of the proper law. The fact that they thereby created an unenforceable method of proper law selection does not lead to the view that the meaning for which Sonatrach contends is the proper

construction of clause 78. The reasons which I have already given for rejecting that construction remain undisturbed.

Variable Choice of Forum

The crucial question for the purposes of the present application is, however, whether the choice of forum mechanism created by clause 78 is equally unenforceable. That raises rather different considerations. In principle, there is no reason why the dispute resolution forum should be identified at the time when the contract is made or indeed at the time of performance. This was clearly decided by the Court of Appeal in The Star Texas [1993] 2 Lloyd's Rep 445. Having regard to the decision in Lovelock (EJR) Ltd v. Exportles, supra, it is essential that the forum selection mechanism is defined with sufficient certainty to enable the court to enforce it.

It is necessary also to have regard to the principle that jurisdiction clauses, as well as arbitration clauses, are free-standing agreements. The principle of separability insulates them from the substantive contract to which they relate: see Mackender v. Feldia AG [1967] 2 QB 590, and IFR Ltd v. Federal Trade Spa (Unrep) 19.9.01, Colman J.

Consistently with that principle, although such clauses do normally have the same proper law as that of the substantive contract to which they relate, this is not necessarily so: see Miller v. Whitworth Street Estates Ltd [1970] AC 583 and Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenberg AG [1981] 2 Lloyd's Rep 446 at p455. In each case the proper law of the arbitration agreement is to be determined according to the general principles for ascertaining the proper law of a contract: there can be an express choice of law or the choice can be implied by reference to that body of law with which the arbitration agreement has its closest and most real connection. Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract. Where, however, there is no such express choice of law in either the substantive agreement or the arbitration agreement, but the venue of the arbitration is identified, it will normally, but not invariably, be concluded that the arbitration agreement and the substantive contract are both governed by the law of that place.

Although an express choice of law provision applicable to the substantive contract may be and often is to be found in the clause which also contains the arbitration agreement or the jurisdiction agreement, it is important to appreciate that such provisions are normally part of the substantive contract and, in the absence of express indications to the contrary, do not fall within the arbitration or jurisdiction agreement so as to invest them with the same attribute of separability of such agreements.

Against this background it is necessary to consider the decision of Bingham J. in The Iran Vojdan [1984] 2 Lloyd's Rep 380. In that case a consignment of electric cable was carried on board an Iranian flag vessel from Hamburg to Dubai. The plaintiff consignees, alleging that the cargo was damaged, commenced proceedings against the shipowners in the English courts. The defendants applied to stay the action on the ground that there was in the bill of lading an exclusive jurisdiction clause under which all disputes were to be tried in Hamburg. There was an issue as to the proper law of the bill of lading contract, the defendants contending for German law and the plaintiffs for Iranian law. The bill of lading contained a provision that the contract was, in the option of the carrier to be declared by him on the merchant's request, to be governed either by Iranian law with the Tehran courts having

exclusive jurisdiction or by German law with the exclusive jurisdiction of the Hamburg courts or by English law with the exclusive jurisdiction of the courts of London.

Bingham J. held that the bill of lading contract was by implication governed by German law as being that body of law with which the contract had its closest and most real connection. He did not arrive at that conclusion on the basis of the optional choice of law clause. Applying German law he concluded that the jurisdiction clause was invalid because it was printed in such small print as to be insufficiently legible. On that basis there was therefore no valid exclusive jurisdiction agreement.

He then considered obiter what the position would be if the proper law were Iranian law. There being no evidence of that law, it was assumed to be identical to English law. It was common ground that, having regard to the decision of the Court of Appeal in Armar Shipping Co v. Caisse Algerienne, supra, the jurisdiction clause was unenforceable at least in so far as it introduced a floating proper law. The question then was whether that invalidity also rendered the optional choice of forum invalid. Bingham J. concluded that it did. At page 385 he said this:

"If the clause had confined itself to conferring three options for the choice of jurisdiction on the carrier alone that would seem to me a clause to which effect could properly and without difficulty be given. Moreover, it would seem to me that the plaintiff could well protect himself against abortive proceedings, if that were the effect of the clause, by requesting an exercise of the option before issuing proceedings in one jurisdiction or another. I very much doubt if there is any obligation on the merchant to request the exercise of the option. I do not, however, construing this clause as a whole, think that the choice of jurisdiction can be excised from each of these sub-clauses and given independent effect if the choice of law falls. They are intimately connected with the choice of law options and are not expressed in the clause as separate options. I think, as a matter of construction, that it is artificial and unreal to give effect to the ancillary provision while rejecting the main provision to which it is, as I think, parasitic. Accordingly, I reach the conclusion that this must be treated as a case in which there is no exclusive jurisdiction, applying the principles of English law on the assumption that that is the same as Iranian law."

As I understand this passage, Bingham J. construed the clause as making the coming into effect of any of jurisdiction options conditional upon or ancillary to the selection of the proper law "the main provision" to which that option was linked. In other words, the jurisdiction agreement took effect only if and when the choice of proper law was made and, since the entitlement to make that choice was unenforceable, the condition subject to which the jurisdiction clause operated, could not be satisfied.

Does similar reasoning lead to a similar conclusion in the present case? In my judgment, the wording of clauses 46 and 78 leads to a different conclusion. Here the ineffective choice of law provisions and the forum selection provisions are expressed to be engaged by the incidence of a dispute having particular characteristics. If the choice of jurisdiction provisions stood alone, there could be no doubt that they were enforceable. They are sufficiently clearly expressed and sufficiently certain to be operated by the courts. However, their coming into effect is not expressed to be conditional upon the coming into effect of the choice of the body of law which matches the forum. Although the provisions as to proper law and choice of forum are positioned together in clauses 46 and 78 respectively, I do not consider that on the proper construction of those provisions the choice of forum can be said

to be parasitic upon or ancillary to the choice of law. Although the applicability of a body of substantive law matching that of the selected forum is obviously a commercially and legally convenient objective, it is in this contract in no sense a pre-condition of forum selection. What is clear is that the main purpose of these provisions is the selection of the forum and not the proper law, so that, in disputes involving Mitsui, the Sub-Charter issues will be before Japanese arbitrators just as the Head Charter issues will be.

I therefore conclude that the invalidity of the choice of law provisions in clause 46 and 78 does not render unenforceable the forum selection regime provided for by those clauses. In arriving at this conclusion I also attach particular weight to the attribute of separability of the forum selection agreement from the substantive contract which includes the choice of law provisions. In the absence of clear words of the kind to be found in The Iran Vojdan, supra, that attribute serves sufficiently to insulate forum selection from choice of law. Putting it another way, forum selection is determined under the composite regime of clauses 46 and 78 by the incidence of a dispute of a particular characteristic. The failure of the parties effectively to match the proper law under the main contract to the forum determined under the arbitration and jurisdiction clause does not render the separate forum selection agreement unenforceable. Forum selection did not depend on proper law selection, but on the nature of the dispute.

I would only add that if it became material for the purposes of the determination either of the issues referred to arbitration in Japan or of those adjudicated in the English courts to ascertain the proper law of the Sub-Charter, that ought to be done in accordance with the conflicts rules of Japanese or English law respectively.

To What Extent Should the Application Succeed?

There can be no doubt that if and to the extent that the claim or any part of it involves a dispute which falls within the scope of the arbitration agreement under clause 46 the defendants are entitled to a mandatory stay under section 9 of the Arbitration Act 1996. It is important to note that under clauses 46 and 78 what determines whether a claim should be referred to arbitration or be brought in the English courts is the nature of the “dispute” to which it gives rise. Thus, for example if an issue as to the amount of hire that is due depends in turn on an issue as to whether the vessel was off-hire in circumstances in which Ferrell would wish to assert that the vessel was off-hire under the Head Charter, it could not be said of the “dispute” as to the amount of hire due that it fell within the exception to the scope of the arbitration agreement. Accordingly, the issue whether the vessel was off-hire would have to be determined in the Japanese Arbitration. If, once that issue had been determined, there remained any consequent issue as to the Sub-Charter hire account which gave rise to no dispute as between Ferrell and Mitsui, that discrete issue would properly fall to be determined in the English courts.

The Particulars of Claim put forward a claim for a balance of hire of US$613,127.01 said to have been overpaid under the Sub-Charter. The calculation of this amount is to be found particularised in the Time Charter Hire Account Reconciliation, which appears as Attachment A to the Particulars of Claim. In paragraph 6 of the Particulars of Claim the claimants put forward alternative damages claims in respect of five of the items of deduction from hire put forward in Attachment A as the basis of the claim for overpayment. These claims include:

(i) a claim amounting to US$498,751.26 for loss of time and $39,303.03 for bunkers for breach of clause 5 and/or 52 of the Sub-Charter by reason by the failure of the vessel to maintain the speed and fuel consumption warranted

under clause 52;
(ii) a claim amounting to US$34,353.60 for the failure of the defendants to give credit in the hire accounts for the cost of fuel oil used for domestic purposes, including cooking, heating and air conditioning pursuant to clauses 19 and 20 of the Sub-Charter;
(iii) a claim for US$11,599.12 for the cost of bunkers supplied by the claimant Sub-charterers but not apparently consumed by the vessel during the period of the sub-charter;
(iv) a claim for disbursements made by the claimant sub-charterers on behalf of the owners of the vessel.
It is in respect of these four claims that the defendants apply for a stay. It is therefore necessary to consider whether they or any of them fall within the scope of the arbitration agreement.
As to this my conclusions are as follows.
(i) The claim for breach of the speed and consumption warranty clearly falls within the arbitration agreement. It involves an allegation of breach of clauses 5 and/or 52 of the Sub-Charter which are also to be found in the Head Charter. The warranty was substantially the same in both contracts, subject to one material difference. The period of the Head Charter was 3 years, whereas that of the Sub-Charter, as extended, was about 14 months. There were therefore different periods for measuring compliance with the speed and fuel consumption provisions of the warranty. It follows that it would, in theory, be possible for the vessel to comply with the warranty under the Head Charter, although in breach of it under the Sub-Charter. However, what matters is whether the dispute under the Sub-Charter gives rise to a dispute between Ferrell and Mitsui under the Head Charter. The evidence before me, namely a witness statement from Miss Bloomfield of the defendants' solicitors, states that Ferrell have claimed against Mitsui in respect of breach of the speed and consumption warranty under the Head Charter. There can, therefore, in my judgment, be no doubt that this dispute under the Sub-Charter falls within the scope of the arbitration agreement.
(ii) As to the fuel for domestic purposes claim, it is brought under clause 19 of the Sub-Charter which is the same as clause 19 of the Head Charter. It is therefore a cost which ultimately is bound to fall on the Owners. The claim by the Sub-Charterers is therefore bound to be passed on up the line. If it is challenged by the Owners, there will be a dispute for the purposes of the arbitration agreement in the Head Charter. If there is no such dispute, it can be assumed that there will be no dispute under the Sub-Charter. On the available evidence it may be assumed that Ferrell will pass on the claim to Mitsui and a stay should therefore be granted.
(iii) As to the claim for bunker consumption discrepancies, this must fall under clause 21 of the Sub-Charter, which is also to be found in the Head Charter. According to the evidence, Ferrell intend to pass this claim on to Mitsui. A stay should therefore be granted.
(iv) As to the claim for Owners disbursements, this too is to be passed on by Ferrell to Mitsui and accordingly a stay should be granted.
The effect will therefore be that a stay will be granted of those claims set out in paragraph 6(i),(ii),(iii) and (iv) of the Particulars of Claim and of such part of the claim for overpaid hire in paragraph 5 as is equivalent in monetary amount to the aggregate of the amounts claimed under paragraph 6(i)(ii) and (iii) together with the amount of the claim for Owner's disbursements under paragraph 6(iv).

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